Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

MICHAEL O'KEEFE, SR.,
GARY BENNETT and JOHN O'BRIEN,

Petitioners,

vs.

UNITED STATES,

Respondent.

On Petition For A Writ Of Certiorari To The U.S. Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the court of appeals improperly applied an "abuse of discretion" standard of review in lieu of a "de novo review" of a motion for new trial based upon Brady material withheld from the defense.

Whether in applying a de novo standard of review, the reviewing court should consider the withheld evidence in light of the trial court's prior granting of a new trial on grounds of delaying production of witness statements and perjury by a government witness.

LIST OF PARTIES

Petitioners Michael H. O'Keefe, Sr., John O'Brien and Gary Bennett were defendants in the District Court and appellants in the Court of Appeals. Respondent, who was appellee in the Court of Appeals, is the United States.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Michael O'Keefe, Sr., Gary Bennett and John O'Brien pray that a writ of certiorari issue to review the judgment of the U.S. Court of Appeals for the Fifth Circuit entered in this case on January 13, 2005.

OPINIONS BELOW

That court rendered an opinion on December 15, 2004 (Appendix A). The District Court for the Eastern District of Louisiana rendered an opinion on October 23, 2003 (Appendix B). The Fifth Circuit Court of Appeals denied a petition for rehearing on January 13, 2005 (Appendix C).

JURISDICTION

This Court has jurisdiction based upon Title 28 USC §1291.

The verdict in this case was entered on March 21, 1996, but because a new trial was granted, and later reinstated, the petitioner, Michael O'Keefe, Sr., was not sentenced until January 1999. O'Keefe, along with his co-defendants, John O'Brien, Gary Bennett, Eric Schmidt and Paul Schmitz had a right to proceed in the District Court because there was jurisdiction over a Motion for New Trial based on Rule 33 of Federal Rules of Criminal Procedure as the Rule existed at the time of the guilty finding.

The mandate of affirmance issued on September 22, 2000 and, therefore, petitioner's June 3, 2002 Motion for a New Trial was timely. The District Court found jurisdiction to hear the Motion. The Fifth Circuit had jurisdiction

based upon a notice of appeal timely filed on October 31, 2003. On December 15, 2004 the Fifth Circuit affirmed the district court's denial of a new trial. The petition for rehearing was denied January 13, 2005 and therefore, the instant writ has been timely filed.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution.

STATEMENT

A. Course of the Proceedings

1. The Indictments and Irregular Trial

Petitioner Michael O'Keefe, Sr. ("O'Keefe") was indicted on March 30, 1995, along with Eric Schmidt, John O'Brien and Gary Bennett in an indictment charging mail and wire fraud, money laundering, and conspiracy. (Record Volume, hereinafter "RV"1pp202-224).

Trial commenced on March 4, 1996 before Chief Judge Morey L. Sear of the Eastern District of Louisiana. The trial was anything but routine. Of the Government's two "key witnesses," one (Charles Donaldson) admitted that he committed perjury when he falsely accused O'Keefe of creating a fraudulent document, and the other (Johnny Moore) changed his testimony to such an extent that the judge and the prosecutor bantered about the resulting grimaces on the prosecutor's face. (RV57pp28-29). There were also the *Brady* violations. *Brady v. Maryland*, 373 U.S. 83 (1963). Among these was the Government's mid-trial production of tape recordings of prosecution

witness Johnny Moore. (RV57 *passim*). Moreover, the Government produced during trial, only after an order of Judge Sear, numerous FBI reports of interview (302s) of its witnesses (*e.g.*, Donaldson and Moore). (RV57 *passim*; RV61pp137-41).

The jury deliberated three days and returned its verdict on March 21, 1996. It found O'Keefe, Schmidt, Bennett and O'Brien guilty of counts 1-2, 4-8 and 14-23, but it acquitted them of count 12. Defendant Schmitz was convicted only of count 12. The Government dismissed counts 3, 9-11 and 13 for failure to admit sufficient evidence.

2. Post-Trial Motions and the Grant of a New Trial

The defendants moved for a judgment of acquittal, a new trial, an evidentiary hearing, an *in camera* review, and for other relief. (RV7pp1561-1709). On August 15, 1996, Chief Judge Sear granted the defendants' motion for new trial, simultaneously recused himself from the case. Among the judge's findings were that:

(a) he could not "conclusively find that the production of the reports [302's] during trial did not adversely affect the court's ability to reach a just conclusion, particularly in light of the government's conduct in connection with the FBI 302 reports of Charles Donaldson." (RV8p1916);

(b) "[t]he sheer number of perjuries [of Donaldson] calls into question whether some as-yet-unidentified additional acts of perjury occurred." (RV8p1931);

(c) "[t]he prosecutors' answers [were] obviously evasive" concerning their knowledge of Donaldson's perjury (RV8p1935); and

(d) "the government's conduct on redirect examination and in closing argument was improper." (RV8p1937).

After reassignment to Section "S" (Judge Lemmon), the Government moved for reconsideration of the new trial and the matter was referred back to Chief Judge Sear. Judge Sear denied the Government's motion for reconsideration the following day.

3. Appeal, Remand, and Continuing Concerns About Compliance with *Brady*

On November 11, 1997, the Fifth Circuit vacated the judgment of the district court granting the new trial and remanded the matter to the district court for further proceedings, including undecided aspects of the defendants' original motion for new trial. (RV9pp2153-86). *United States v. O'Keefe*, 128 F.3d 885 (5th Cir. 1997) (*"O'Keefe I"*), *cert. denied*, 118 S.Ct. 1525 (1998). The Panel in *O'Keefe I* held that:

(a) Judge Sear abused his "discretion when [he] made the factual finding that the government changed the indictments to mislead the defense" because "the defense had too much knowledge of the minutes to be misled." *Id.* at 895;

(b) Donaldson's perjury was not material, was elicited on cross-examination, and occurred on collateral matters. *Id.* at 896-97; ***but***

(c) the Panel did "not disagree with the trial court's conclusion that the government was aware of Donaldson's falsehoods prior to trial. . . . " *Id.* at 897, fn. 11.

The defendants applied for rehearing, rehearing *en banc*, and a writ of *certiorari* to the Supreme Court, all of which were denied. *Id.*

4. The Sentencing

On January 11, 1999, after several days of hearings, this Court sentenced O'Keefe, (then age 67), to a term of imprisonment of 19 years and 7 months. (RV86p19). The Court remarked that it had received a number of letters from "respected members of the community . . . questioning the fairness of your trial . . . ," commenting: "I have been instructed by the Fifth Circuit not to delve into [that subject]."

The Fifth Circuit ultimately upheld the convictions in an unpublished opinion *U.S. v. Eric Schmidt, et al.*, No. 99-30082 (5th Cir. 2000).

5. The Instant Motion for New Trial Under Rule 33

As a result of civil litigation related to this matter, the depositions of Johnny Moore and other individuals were taken. Based on this testimony, the defendants filed a second motion for new trial based on newly discovered evidence under Rule 33. The motion was filed on June 3, 2002, and alleged: that there were enumerated perjuries by Johnny Moore; that there was newly discovered evidence with regard to other witnesses; and that based on *Brady* a new trial was warranted. (RV17p4500-4560). An

evidentiary hearing was held on November 14, 2002 and subsequent dates. On the third day of the hearing, the court released, after *in camera* review, a number of documents never seen by the defense.[1] The discovery of these documents provided additional proof of *Brady* violations.

6. The Evidentiary Hearing Based on the Rule 33 Motion

At an evidentiary hearing on the motion for new trial, defense once again called for production of all Johnny Moore statements. After *in camera* review, three additional FBI documents, never seen by the defense, were provided by the court and then released to the defense. These documents, which were obviously suppressed, contain new information that allowed the defense to further impeach Moore's testimony. Moore lied about having had a tape recording of O'Keefe at his first interview with the Government. These documents revealed that the first interview was on October 21, 1993, not October 22, 1993. This new evidence of unsupervised taping affects the integrity of the key government tape recording which was used to support the Government's contention that O'Keefe was bribed Moore in 1991 by the offer of Moore's trust fund money.

Additionally, these same documents also contained newly revealed false allegations against O'Keefe. The new FBI documents reflected that during these initial interviews, Moore, alleged that he and O'Keefe had a plan to

[1] The defense contends that this newly discovered evidence further demonstrates the *Brady* violations and a new trial is in order based on the argument below.

"fool the auditors" with a $1,000.00 check. There was no evidence of this bizarre plan, and defense could have impeached Moore by demonstrating that these false allegations against O'Keefe were similar to the false allegations made by Donaldson.

The newly discovered evidence of the civil deposition testimony of Moore, and the newly revealed documents were used to effectively impeach Moore at the evidentiary hearing. Proof that the newly revealed evidence is material and favorable to the defense was found in the District Court's reaction to Moore's testimony. Immediately after his evidentiary hearing testimony about his initial meetings with the Government, the court advised the prosecution that Moore should be advised of the laws of perjury. Further, in addressing the issues presented by the evidentiary hearing, the District Court found:

> Moore's testimony at the hearing was clearly manipulative. His memory was convenient, and the testimony was inconsistent within itself. Judge Sear's characterization that the jury saw a witness whose testimony was "eager" and "ever-changing" is equally applicable to Moore's testimony at the hearing. (RV19p5005).

Additionally, O'Keefe raised the issue of the cumulative effect of all of the errors that were apparent from the evidentiary hearing.

The district court denied the motion for new trial. (*See* Opinion RV19pp4979-5033). A notice of appeal was filed on October 31, 2003.

The Fifth Circuit denied petitioner's appeal based upon an "abuse of discretion" standard (*See* Appendix A).

B. Statement of Relevant Facts to the Petition

All statements by Moore at the inception of his cooperation were of intense interest to the defense. The defense has always been suspect of the "big gap" in FBI records between October 1993 (the first day of Moore's cooperation) and September 1994 (the date of the first FBI 302). For over six years, the defense had consistently urged the prosecution to honor its *Brady* obligation – in a pre-trial *Brady* motion, in a letter immediately prior to trial,[2] during the trial,[3] in 1998 motions for a new trial, and in the 2002 instant motion for new trial.[4]

It was stipulated that the Government failed to produce to Judge Sears three documents (*See* Appendix D, Record Excerpts 9, 10 and 11) which were provided to the defense for the first time during the evidentiary hearing in November 2003. (RV19p5011). The failure of the prosecution to provide at trial the three 1993 memoranda containing statements of Johnny Moore is a classic violation of the *Brady* rule.

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[2] March 1, 1996 letter (Record Excerpt 8) asking the Government to re-examine its file for *Brady* materials in light of Moore's changes of testimony in connection with the sequence of tapings. (Exhibit T-44, Tab 21, *see* Record Excerpts).

[3] During the trial the defense asked for "all statements" of Johnny Moore, in the initial Motion for New Trial before Judge Sear (Exhibit T-44, Tab 23).

[4] "Fourth, the absence of any Government documentation or notes reflecting a debriefing of Moore from the time of his initial cooperation on October 22, 1993 until September 15, 1994." *See* page 47. (RV17p4557).

1. Moore Lied About Having a Tape-Recording of O'Keefe at His First Interview

A review of those documents provided the defense with evidence that the first meeting between Moore and the Government officials was on October 21, not October 22, 1993.[5] Based upon Pre-Trial hearing testimony and documents provided to the defense prior to trial, defense was misled into believing that (1) that the first meeting between Moore and the U.S. Attorney occurred on October 22, 1993, (2) that on that date Moore delivered a previous tape recording of O'Keefe and Moore's discussions, and (3) that the prior taping was a "spur of the moment" decision and had not been recorded by Moore as a part of any effort to build a case against O'Keefe.

At trial Moore perpetuated the above lies on direct examination.[6]

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[5] All documents and evidence given to the defense contained the date October 22, 1993 as the first contact between Moore and federal authorities.

[6] Asst. United States Attorney:

Q And date did you meet with Mr. Gonzales?

Moore:

A I think it was October 22. I believe that was right.

Q And –

A Of 1993.

Q – had you – And had you taped Mr. O'Keefe in a short conversation with when you went to see Mr. Gonzales?

A *Yes, I had taped him that same day*, I believe.

(RV59p227-228).

Moore tried to convince the jury of the "mere happenstance" of his recording of the telephone call. This new evidence called into questioning Moore's credibility and reliability as to the taping process.

Newly revealed evidence leads to the conclusion that on October 21, 1993 after the first meeting, Moore set about to tape record and "set up" O'Keefe for later tape recordings. After going to federal authorities on October 21, Moore recorded O'Keefe and presented the tape to the prosecution the next day. Moore's explanation that this prior tape recording of O'Keefe was a "spur of the moment" recording was totally implausible.

Moore was confronted with this new information during the evidentiary hearing; he feigned a complete lack of recollection in testimony that drew a stern warning from the district judge: (Hearing RV93p97-98).

Immediately thereafter, the court addressed the Assistant United States Attorney stating "I almost think at this point in time you ought to kind of instruct him on perjury, I mean having amnesia is not telling the truth. And I kind of think that there's no way that there is something as significant as this meeting and you can sit up and say, I do not remember. Maybe I'm the one that needs to instruct him on perjury." Evidentiary Hearing (RV93p39).

In granting a new trial in 1996, Judge Sear previously noted that defendants "actively point out that Moore continuously changed his testimony on many matters." (RV8pp1940-1941). Now, a second district judge has found Moore incredible. If the district judge, who has heard the testimony and judged the demeanor of the witness, believes the witness is perjuring himself, it is certainly

reasonable to believe that a jury would likewise have concluded that Moore was unworthy of belief and disregarded his testimony.

2. New Evidence of Unsupervised Taping Affects the Key Government Tape Recording

The significance of the failure to advise the jury (or defense) that Moore did not have the tapes of O'Keefe with him during the first meeting, relates to the unsupervised taping of O'Keefe and others, and to Moore's ability to manipulate the content of recorded conversations. *See U.S. v. Rivera Pedin*, 861 F.2d 1522, 1528 (11th Cir. 1988) (reversing a conviction based upon failure to disclose informant's diary relative to erased tapes where the informant's recordings were represented to the jury as complete and accurate).

The new evidence demonstrated that Moore was "on his own" making cases.[7] This is exactly what occurred in connection with Moore's response to O'Keefe on the tape of October 28, 1993 – a key part of the Government's case. This tape recording was requested by the jury during its deliberations and was the last evidence heard by the jury before its verdict.

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[7] Moore testified at trial that he accidentally erased a tape recording of one of his supervisors. (RV56p133).

3. The New Evidence Revealed False Allegations by Moore Against O'Keefe Did Not Violate *Brady*

The Government failed to provide *Brady* documents relative to bizarre allegations of an alleged plan to fool auditors with a $1,000.00 check and $441,000.00 of stolen funds placed in O'Keefe's account. The district court opinion fails to consider this issue.

These allegations were not made to the jury, and, therefore these failures to provide *Brady* material would have severely undermined Moore's credibility. Nevertheless, the failure to disclose these allegations was a *Brady* violation.

REASONS FOR GRANTING THE WRIT

A. Conflict as to the Standard of Review

The Fifth Circuit Court of Appeals affirmed the district court's Order denying the motion for a new trial. The Fifth Circuit, using an "abuse of discretion", upheld district court rulings. In his brief to the Fifth Circuit, petitioner argued that in context of an appeal of a denial of a motion for new trial based on newly discovered evidence constituting *Brady* information, appellate courts should review "any *Brady* determination *de novo*". Appellant, O'Keefe's Brief, p. 23.

The panel in the instant case used the abuse of discretion standard. (*See* Appendix A, App. 2).

In another recent case the Fifth Circuit utilized a *de novo* review. In the case of *United States v. Sipe*, 388 F.3d 471 (5th Cir. 2004), the court stated:

> "In general we review a denial or grant of a criminal defendant's motion for new trial for an abuse of discretion. *There is some confusion in our circuit, however, regarding whether we apply an abuse of discretion standard when a new trial is granted because of* ***Brady*** *violations.* In some cases, we have conducted a *de novo* review (citing *United States versus Runyan*, 290 Fed.3d 223, 246 (5th Cir., 2002) et al.), while in others we have asked only whether the district court abused its discretion (citing *Burton versus United States*, 337 Fed.3d 490, 493 (5th Cir., 2000) et al.). *Our sister circuits are equally divided on the subject.*" *United States versus Sipe*, 388 F.3d 471, 478 (5th Cir. 2004). (emphasis added).

The Fifth Circuit in *Sipe* further stated:

> "Confusion stems in part from the mixed nature of the *Brady* inquiry. Whereas we typically analyze legal issues *de novo*, a *Brady* determination is inevitably a contextual inquiry involving questions of both law and fact." *Sipe* at p. 479.

In *Sipe*, the Fifth Circuit noted the following division in panel opinions. A *de novo* review was the standard used in *United States v. Runyan*, 290 F.3d 223, 246 (5th Cir. 2002); *United States v. Hughes*, 230 F.3d 815, 817 (5th Cir. 2000); *United States v. Gonzales*, 121 F.3d 928, 946 (5th Cir. 1997); *United States v. Dixon*, 132 F.3d 192, 199 (5th Cir. 1997); *see also United States v. Lee*, 88 Fed.Appx. 682 (5th Cir. 2004) (unpublished).

On the other hand, an abuse of discretion standard was used in *Burton v. United States*, 237 F.3d 490, 493 (5th Cir. 2000); *United States v. Cisneros*, 112 F.3d 1272, 1277-78 (5th Cir. 1997); *United States v. Shugart*, 117 F.3d 838, 847-48 (5th Cir. 1997); *United States v. Williams*, 985

F.2d 749, 757 (5th Cir. 1993); *United States v. Burns*, 668 F.2d 855, 859-60 (5th Cir. 1982).

When a ruling on a Motion for New Trial based on *Brady* violations is before appellate court, that court should conduct a *de novo* review. While some deference must be given to the fact finding by the district court, factual review should not be under a clearly erroneous standard. Just as the panel opinions in the Fifth Circuit are divided, the review of other circuits reveals a mixture of decisions which leave the law unclear. For example, in the Ninth Circuit case of the *United States v. Booth*, 309 F.3d 566, 573 (9th Cir. 2002), the court opined that "reviews of claims of *Brady* violations are 'de novo'". In the Eleventh Circuit in the case of *Kelly v. Secretary of Department of Corrections*, 377 F.3d 1317, 1357 (2004) the court held that alleged *Brady* violations present mixed questions of law and fact which the Court of Appeals review "de novo". The Sixth Circuit in the *United States v. Brown*, 33 F.3d 363, 369 (6th Cir. 2003), ruled that reviews of denial of *Brady* claims must be *de novo*.

In other circuits there are opinions which opined that the denial or granting of a motion for new trial on *Brady* are overturned only if there is abuse of discretion by rendering the decision arbitrary and capricious. *See United States v. Robinson*, 39 F.3d 111, 116 (10th Cir. 1994). In the Seventh Circuit in *Abbot v. United States*, 195 F.3d 946, 948 (1999) the court ruled that defendant was not entitled to relief under *Brady* unless the district court ruling was clearly erroneous. In the First Circuit in *United States v. Rosaria-Peralta*, 199 F.3d 552, 557 (1999) that court held that the standard is abuse of discretion. In the Eighth Circuit in the *United States v. Rushing*, 388 F.3d 1153, 1158 (8th Cir. 2004), the court held that claims of *Brady*

violations are subject to appellate review if there is "clear error in the district court's findings". In the Third Circuit, the standard review of *Brady* claims is a *de novo* review of the district court's conclusion of law but a review of findings of fact based on "clearly erroneous standards". *See United States v. Pelullo*, 14 F.3d 881 (3rd Cir. 1994) and *United States v. Brown*, 530 F.3d 811 (3rd Cir. 2001).

It is submitted that the division within the Fifth Circuit panels, along with the division in the Circuits as cited above, is a reason for granting certiorari to clarify the standard of review in motions for new trial under *Brady*.

The panel in *Sipe* went on to hold that "because the court must judge the effect of the evidence on the jury's verdict, the *Brady* decision can never be divorced from the narrative of the trial." *Sipe* at p. 479. "The court must consider not simply the withheld evidence in isolation, but also quantity and quality of other evidence in the record." *Id.* at p. 479. In *Sipe* the court pointed out that "the appellate court's reviewing of *Brady* violation is an inherent disadvantage . . . The district court, by contrast, has at least the opportunity to hear the evidence at the trial first hand and view the demeanor of the witnesses, observe the ebb and flow of evidence at trial and evaluate the strengths and weaknesses of the government's case." *Id.*

B. Deference to the Trial Court's Prior Ruling in 1996

In the instant case, the district judge who had the "opportunity to hear the testimony at trial" was Judge Sear, the trial judge in 1996. Judge Sear granted the petitioner a new trial based upon perjury by one of the two

key government witnesses and delayed production of *Brady* materials. While the trial court questioned credibility of the second witness (Johnny Moore), the trial court in 1996 was unable to conclude perjury occurred as to the second witness.

If the reviewing court is to give the "trial court" superior understanding of the trial's evidence and witnesses, the new *Brady* violation should be reviewed in context of the *trial court* who actually heard the evidence in question. The district court who held the evidentiary hearing and the Fifth Circuit panel failed to consider the cumulative effect of additional failures to disclose by the government (i.e., the *Brady* material in question).

In *Sipe*, the panel reviewed the case to determine the cumulative effect of *Brady* violations. *Id.* 493. The court noted that "throughout the proceedings the government's disclosures were inadequate." *Id.* 493. In the instant case the "government's disclosures were inadequate." In *Sipe*, the court noted that the trial court "sat through the trial, learned of the government's repeated nondisclosures. . . . and was troubled." Likewise, in the instant case, Judge Sears, the trial court judge, was "troubled" and no doubt would have granted a new trial based on these additional non-disclosed FBI reports. (Appendix D).

See also United States v. Causey, 356 F.Supp. 2d 681 (S.D. Tex. 2005) and *Orena v. United States*, 956 F.Supp. 1071 (E.D. N.Y. 1997).

C. The District Court and the Fifth Circuit Failed to Consider the New Brady Materials in Light of the Trial Court's Rulings in 1996

The district court (as opposed to the actual trial judge) that reviewed the motion for new trial was of the apparent belief that the Fifth Circuit had somehow excluded the review of fairness of the trial as viewed by Judge Sear.

On several occasions the district court conducting the evidentiary hearing commented that prior Fifth Circuit opinions prohibited the Court from delving into certain areas. For example, at the sentencing, the Court committed that the community had questioned the "fairness" of the trial. The district court commented, "I have been instructed by the Fifth Circuit not to delve into (that subject)."[8]

Similarly, in connection with the ruling on the instant motion for newly discovered evidence, the district court, after admitting that Moore's civil deposition contradicted his trial testimony, commented that the Fifth Circuit had "foreclosed this contradiction as a grounds for a new trial in its prior ruling." RV19p5006. The prior Fifth Circuit panel had no evidence of this contradiction before it.

While the district court found that Moore's testimony was "clearly manipulative", convenient, and "inconsistent within itself," (*Id.* at 27, fn. 16) the district court felt

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[8] In ruling on prior motions for new trial, the district court commented "the Fifth Circuit has overturned this court's Order that would allow the defendants an in camera inspection of documents." (RV14p3758).

precluded from analyzing this new evidence based upon a review of the evidence in its entirety.

The Government's pattern of *Brady* violations in 1996 and the failure to disclose the documents referred in the new trial motion demonstrate a total disregard for the constitutional rights of these defendants. U.S. Const. Amend. V. The court should consider the Government's history of non-disclosures (or late disclosures) during the trial in a *de novo* review.[9]

D. Proof that the Newly Revealed Evidence is Material and Favorable to the Defense is Found in the District Court's Reaction to Moore's Testimony at the Hearing.

Armed with the newly revealed evidence, the defense finally could have made a frontal assault in the credibility of Moore as outlined above. The most telling proof of the effect of this new evidence testimony is the district court's own reaction to Moore's testimony at this evidentiary hearing in light of all that was revealed. In its opinion, the district court noted:

> "Moore's testimony at the hearing was clearly manipulative. His memory was convenient, and

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[9] During the course of the trial of this matter, Government prosecutors failed to produce the January 10, 1994 tape recordings between Mr. Moore and one of the state prosecutors (who was in the courtroom) until after O'Keefe's counsel had nearly completed his cross-examination of Moore. As shown at the hearing, this caused disruption in connection with the defense's effort to cross-examine Mr. Moore and, indeed, this area of cross-examination would have been pursued more effectively if the tape would have been provided timely. (RV94pp257-259).

> the testimony was inconsistent within itself. Judge Sears characterization that the jury saw a witness whose testimony was "eager" and "ever changing" is equally applicable to Moore's testimony at the hearing." (RV19p27 fn. 16).

Furthermore, it was during the cross-examination of Moore as to the initial meeting with the U.S. Attorneys, that compelled the District Court to advise Moore about the laws of perjury. A jury would have had the same reaction to Moore's credibility, especially in light of perjury by the other key Government witness.

CONCLUSION

It is respectfully suggested that the standard of review with regard to the Motion for a New Trial based upon *Brady* violations is not clearly established in the Fifth Circuit. Furthermore, there is a confusion within the circuits as to the standard to be applied. Petitioner urges a *de novo* review. The "abuse of discretion" standard used by the Fifth Circuit panel to affirm the denial of a new trial is not the proper standard of review.

The facts of the instant case would allow this Court to clarify this area of the law in a case where the government withheld certain documents for six (6) years. The Fifth Circuit panel reviewing the petitioners stated, "We assume without deciding that these documents should have been turned over to the defense under the *Brady* Act or for some other reason. If this assumption is a basis for the opinion, the reviewing court should then examine this matter in context of a *de novo* review. If deference is to be given to the "trial court" who heard the evidence at trial, then

these new *Brady* violations by the government should be placed in context of the prior ruling granting the petitioners a new trial as the cumulative effect should be the granting of a new trial.

A writ of certiorari should be granted to ensure a proper standard of review for the motion for new trial based upon *Brady* violations.

Petitioner John O'Brien joins petitioners O'Keefe and Bennett requesting that a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

REVISED JANUARY 4, 2005

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 03-31061

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MICHAEL O'KEEFE, SR.,
GARY BENNETT, JOHN O'BRIEN,

Defendants-Appellants.

Appeals from the United States District Court
for the Eastern District of Louisiana
(USDC No. 95-CR-106-1-S)

(Filed December 15, 2004)

Before REAVLEY, WIENER and BENAVIDES, Circuit Judges.

PER CURIAM:*

The order denying the motions for new trial is affirmed. We essentially agree with the Order and Reasons

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* Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

of the district court, and appellants do not persuade us that the district court abused its discretion in denying the motions. We make the following additional observations.

O'Keefe's argument to this court that Moore gave "false testimony to the jury that he had 'no deal' with the Government," O'Keefe's opening brief at 9, and that in a post-trial civil deposition Moore "for the first time admitted that, through his attorney, he did obtain a 'deal with the government,'" *id.* at 28, is highly misleading and a mischaracterization of the record. Moore testified at the criminal trial at length about his plea agreement. We previously noted in the second appeal to this court that "Moore admitted he stole money from his trust account with O'Keefe's blessing, and had pleaded guilty to such and was testifying pursuant to a plea agreement." *O'Keefe II*, at 27. The plea agreement itself was admitted into evidence.

O'Keefe argues that Moore revealed after the criminal trial that he had an agreement with the State of Louisiana "for forbearance for state prosecution for theft." O'Keefe brief at 14. Moore testified at the criminal trial that he had pleaded guilty to both state and federal charges and was testifying pursuant to a federal plea bargain. O'Keefe does not persuade us that the federal government was aware of the particulars of his agreement with state authorities or that these particulars would have been considered material to the federal criminal jury. Accordingly, he has not shown a *Brady* or *Napue* violation or other grounds for a new trial based on the state charges.

Regarding the three interview records produced at the hearing on the motion for new trial, appellants make several arguments. We assume without deciding that

these documents should have been turned over to the defense under the Jencks Act or for some other reason. Insofar as these documents reveal a plan by O'Keefe to fool the auditors with a fake check, this information strikes us as highly inculpatory of O'Keefe and appellants do not persuade us that such information, if revealed to the jury, would have assisted their defense.

Insofar as appellants argue that the documents reveal that Moore was somehow persuaded to change his initial position with the federal authorities and turn on O'Keefe, we agree with the district court that the documents do not support this theory.

O'Keefe also argues that the documents reveal that O'Keefe had tape-recorded a conversation with Moore immediately after going to the federal authorities rather than immediately before going to the authorities as he testified at trial. The government contends that this argument is a new one and should be reviewed for plain error only. We agree. Moreover, even if the argument had been raised below O'Keefe does not persuade us that the alleged one-day discrepancy in the date Moore first tape-recorded a conversation with O'Keefe is so material as to merit a new trial. The evidence presented to the jury was clear that Moore was a cooperating witness who was testifying pursuant to a plea bargain, whether the first recording was made immediately before or after Moore first met with federal authorities. The defense would have been able to argue that Moore was trying to "set up" O'Keefe either way.

Appellants make references to a missing 302 report Agent Phillips wrote of the initial interview with Moore. They cite Phillips' testimony that she would normally

prepare a 302 and could not explain why the 302 for the initial meeting was missing. Appellants have not demonstrated a *Brady* violation or any other reversible error with regards to this alleged missing interview memo. They do not prove that this 302 ever existed, that it contained exculpatory information, that it was suppressed, or that it was material.

O'Keefe alleges as another *Brady* violation that the government failed to disclose a state interview report of an interview with Gene Broussard, deputy receiver for the Louisiana Department of Insurance. The report indicates that Moore told Broussard, "If I'm going down, I'm going to take other people with me." The district court found that this document was available from the state to defendants upon request. This finding was based on testimony from a state official and is not clearly erroneous. "*Brady* does not require the government to conduct a defendant's investigation or to assist in the presentation of the defense's case." *United States v. Aubin*, 87 F.3d 141, 148 (5th Cir. 1996) (internal quotation marks omitted). Further, appellants do not persuade us that the statement was material in the context of the lengthy criminal trial during which Moore was subjected to extensive cross-examination. The jury was well aware that Moore had recorded conversations, was otherwise cooperating with the government, and was testifying against the defendants in hopes of a reduced sentence. He testified that pursuant to the plea agreement the government had limited his criminal exposure to a single felony and that if he gave truthful testimony the government might file a motion for a reduced sentence.

Bennett makes several arguments based on alleged newly discovered evidence in the form of deposition and hearing testimony of L.D. Barringer, and a 302 report of

an interview with Barringer. Bennett argues that based on this evidence Barringer denies that he ever attended a meeting about which Moore testified at trial. At trial, Moore testified that based on a meeting with Barringer and others he believed the money that was held in his trust account belonged to BCI or Associated Auditors rather than PNRRG. Bennett does not persuade us that Barringer's testimony contradicting Moore's testimony at trial is material. In order to merit a new trial, the defendant must prove that (1) the evidence is newly discovered and was unknown to him at the time of trial, (2) the failure to discover the evidence was not due to his lack of diligence, (3) the evidence is not merely cumulative, but is material, and (4) the evidence would probably produce an acquittal. *See United States v. Jaramillo*, 42 F.3d 920, 924 (5th Cir. 1995).

Whether or not the money Moore held in his trust account belonged to BCI or PNRRG was not central to government's case. Bennett's argument is similar to a motion for new trial we reviewed in *O'Keefe II*. In this earlier motion, O'Keefe claimed "that at trial Moore testified that money in the trust account was BCI's money, while in the later civil proceeding he claimed that the funds belonged to the PNRRG estate. . . . This evidence, even if newly discovered, does not change the fundamental facts that Moore admitted he stole money from his trust account with O'Keefe's blessing, and had pleaded guilty to such and was testifying pursuant to a plea agreement. The district court did not abuse its discretion in denying a new trial." *O'Keefe II*, at 27. We also stated that as to the earlier motion "O'Keefe does not explain convincingly why it matter [sic] whether the funds were held in trust for

BCI or PNRRG." *Id.* We think the same analysis applies to the present appeal.

Bennett also cites other testimony from Barringer's post-trial civil deposition which is allegedly inconsistent with the government's theory of the case in the criminal trial. However, Bennett does not persuade us that the district court erred in finding that "Barringer was available to the defendants at trial, and it is not probable that the introduction of the testimony from Barringer's civil deposition would produce an acquittal." At the new trial hearing, Barringer was shown the side agreements with AIC which he had not seen at his deposition. The AIC side agreement was a key component of the overall scheme by defendants to personally enrich themselves, as we discussed in *O'Keefe II*. *Id.* at 7-8.

All other pending motions to this appeal as [sic] dismissed as moot.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA **CIVIL ACTION**

VERSUS **NO: 95-0106**

MICHAEL O'KEEFE, SR. ET AL. **SECTION: "S" (5)**

ORDER AND REASONS

(Filed Oct. 23, 2003)

IT IS HEREBY ORDERED that the Rule 33 motions for a new trial based on newly discovered evidence of Michael O'Keefe, John O'Brien, Eric Schmidt, Gary Bennett, and Paul Schmitz are **DENIED**. (Documents #541, #546, #547, #558, #668, #677).

I. FACTUAL BACKGROUND

Five defendants were convicted of multiple crimes, including conspiracy, mail and wire fraud, and money laundering, in connection with a fraudulent insurance scheme.[1] The following facts are taken from the trial transcripts, various previous opinions in the case, and the evidence presented to the court at an evidentiary hearing on the motions for a new trial.

Michael O'Keefe was affiliated with Associated Auditors, Inc, a company which took over the management of

[1] The jury found Michael O'Keefe, Eric Schmidt, Gary Bennett and John O'Brien guilty of counts 1-2, 4-8, and 14-23 and Paul Schmitz guilty of count 12. *See* Appendix "A", a copy of the redacted version of the Second Superseding Indictment and the jury verdict forms.

Physicians National Risk Retention Group, Inc. (PNRRG), a Louisiana medical malpractice insurer. Eric Schmidt, O'Keefe's son-in-law, served as president and a member of the Board of PNRRG. Gary Bennett and John O'Brien were involved in the management, and Paul Schmitz was a claims manager.

In 1991, PNRRG became insolvent, and the Department of Insurance of the State of Louisiana moved to liquidate it. Johnny Moore, a private attorney, was hired to represent the Department of Insurance in the conservation and liquidation of PNRRG. L.D. Barringer and Mike Mabry were partners in Heritage Management, which served as the deputy conservator of PNRRG. In the role of deputy conservator, Barringer was required to take action to assure that the physicians were provided with medical malpractice coverage. As an alternative to liquidation, a tentative arrangement to form a new risk retention entity was drafted and presented to the Board of Directors of PNRRG and the Department of Insurance on September 12, 1991. Moore obtained court approval of the proposal.

PNNRG [sic] and Builders and Contractors Insurance Limited (Builders and Contractors) entered an "Agreement of Reinsurance" on October 18, 1991, to have Builders and Contractor act as reinsurer. Exh. T-5. The agreement was signed by Eric Schmidt, as president of PNRRG, and Charles Donaldson, as managing director of Builders and Contractors. Builders and Contractors was a dormant Bahamian corporation under the control of Charles Donaldson, a veteran of the insurance industry

and a former Registrar of Insurance for the Bahamas.[2] The agreement provided that the business be assumed by Builders and Contractors and later by a new risk retention group owned by the physicians. The premiums for the covered physicians would be transferred from PNRRG to Builders and Contractors.

The Board of Directors of PNRRG approved the reinsurance transaction, and the Louisiana Department of Insurance authorized the transfer of over $10,700,000 of PNRRG's cash assets to O'Keefe's law firm trust account to be held on behalf of Builders and Contractors.

The agreement between PNRRG and Builders and Contractors further required that Builders and Contractors enter into a reinsurance contract with Sphere Drake to provide excess coverage. *United States of America v. O'Keefe*, No. 99-3082 (5th Cir. Sept. 25, 2000); exh. T-5, T-26. The Sphere Drake reinsurance contract, effective October 1, 1991, was canceled by O'Keefe, Schmidt, Bennett, and O'Brien on January 21, 1992, effective April 15, 1992, without notifying the Department of Insurance, the physicians, or their agents. *Id.*

In order to provide for the return of any unearned premiums or accounts receivable[3] that were in dispute,

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[2] Donaldson pleaded guilty to one count of mail fraud, in violation of 18 U.S.C. § 1341, in the Middle District of Louisiana. Donaldson received a "split sentence" consisting of four months in the custody of the Bureau of Prisons and four months in a community confinement center and a three-year term of supervised release. The sentence represented a downward departure from the guideline range based on the government's § 5K1.1 motion.

[3] The closing statement reflects that a certified audit by a national CPA firm was necessary to determine the precise amount of unearned premiums and accounts receivable to be transferred from PNRRG to

(Continued on following page)

$527,105 from PNRRG's estate was placed in escrow in Moore's trust account. Exh. T-9. The money was to remain in the trust account pending an audit by a national CPA firm to determine whether the money would remain in the PNRRG estate or be transferred to Builders and Contractors.[4] Exh. T-9, T-10. Moore took the money for his personal use before any audit,[5] and the Department of

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Builders and Contractors. Exh. T-28. The unearned premiums on October 1, 1991 were $8,747,467, but the final amount after the audit would not be less than $8,500,000. *Id.* A multiple of 2.13 was applied to the difference between $8,747,467 and $8,500,000 to arrive at the escrow amount of $527,105. *Id.*

The accounts receivable of $695,550 was "based on an estimate of the receivable balance on October 1, 1991 of $1,132,306 less cash receipt on October 2, 1991 through October 29, 1991 of $436,756." *Id.* The final amount after the audit would not be less than $695,550. *Id.* No additional funds were escrowed for accounts receivable.

[4] The original agreement stated that "if a certified unqualified audit by a national CPA firm is not received by Builders and Contractors Insurance Company, Ltd. by December 15, 1991, amounts determined by Associated Auditors, Inc. will be final." Moore changed the document to reflect that the audit should be accomplished within a "reasonable" time.

[5] Moore entered an agreement with the government in federal court to plead guilty to one count of mail fraud, in violation of 18 U.S.C. § 1341. The factual basis for the plea provided as follows:

> In 1987, Physician's National Risk Retention Group obtained a Certificate of Authority from the Louisiana Department of Insurance. That certificate entitled PNRRG to sell medical malpractice insurance to physicians in Louisiana and other states.
>
> In 1991, PNRRG was under regulatory scrutiny by the Louisiana Department of Insurance. Johnny Moore was hired by the Louisiana Department of Insurance to be its legal representative in its inquiry into the affairs of PNRRG.
>
> In March, 1990, Michael O'Keefe, Sr., was hired by Physicians National and Associated Auditors, a company run by Mr. O'Keefe's son-in-law, Eric Schmidt, which had

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become the managing general agent for Physicians National to be a legal representative in matters concerning the Louisiana Department of Insurance.

In August 1991, the Louisiana Department of Insurance placed Physicians National into conservation. In response to the regulatory action taken by the Insurance Department, the Board of Directors of Physicians National were persuaded by Michael O'Keefe and Eric Schmidt that the best course of action to take in the interest of Physicians National and its insured positions would be to agree to a voluntary liquidation of the company contingent upon the acquiescence of the Insurance Department to a contract of re-insurance whereby the remaining policy year coverage for Physicians National insureds, excluding coverage on already existing claims files, would be transferred to and continued by Builders and Contractors, Ltd. and Sphere-Drake, two offshore insurance companies.

Under the terms of the purported contract, which was signed on or about October 18, 1991, the assets transferred to Builders and Contractors in connection with the agreement were to be placed in a trust account in Louisiana. Draws from that trust account were to be utilized only for one or more of the following: 1) to return premiums to the owners of policies reinsured hereunder on account of cancellations of such policies; 2) to pay losses and allocated loss adjustment expenses under the terms and provisions of the policies reinsured; 3) to pay any reinsurance costs incurred, and 4) to pay any federal excise taxes due.

Michael O'Keefe, Sr. arranged for the transfer of funds associated with the trust to be from PNRRG's account to his own lawyer's trust account in New Orleans. This resulted in a cash transfer in excess of $10 million in November 1991. It was also arranged that an amount of cash in dispute, unearned premium that would remain with the PNRRG estate or be transferred to BCI depending upon the result of an independent audit, would be transferred from the PNRRG account to the trust account of Johnny Moore, the Insurance Department's attorney. This also occurred in November 1991.

Several days prior to the transfer of funds to the O'Keefe and Moore trust accounts, Mr. O'Keefe and Mr.

(Continued on following page)

Moore engaged in a conversation in which Michael O'Keefe initiated a discussion of changing political circumstances in Louisiana and their potential effects on Mr. Moore's livelihood. Moore expressed the opinion that upon the office-taking of the newly elected Louisiana Commissioner of Insurance, Moore would be fired as an attorney for the Insurance Department. O'Keefe indicated to Moore that because O'Keefe was pleased with the manner in which Moore had negotiated with him over the liquidation of PNRRG and the transfer of PNRRG assets, purportedly to BCI, O'Keefe would exercise his political influence over the incoming Insurance commissioner to protect Moore's job. Moore accepted O'Keefe's offer of assistance in maintaining his employment under the new Commissioner.

In a subsequent conversation in November 1991, O'Keefe and Moore discussed the details of the proposed closing statement to be submitted to PNRRG and the Department of Insurance concerning the BCI transaction. Prior negotiations between PNRRG, the Insurance Department, and Associated Auditors had resulted in a closing statement draft which would have required the Insurance Department, as administrator of the estate of PNRRG, to conduct an independent audit on or before December 15, 1991, or concede the disputed amount of $527,105.00 to BCI. Under those conditions, it would have been incumbent upon Johnny Moore to cause such an audit to take place forthwith, with the possible result that he be required to return the $527,105.00 to the PNRRG account in liquidation rather than maintain control of it himself. During this conversation, O'Keefe and Moore agreed to alter the terms of the closing such that the December 15 deadline be removed and new language be inserted, calling for an audit to occur at a "reasonable time." This action allowed Moore to maintain control of the funds indefinitely. On or about November 13, 1991, Moore received from O'Keefe, via United States mail, a copy of a "Closing Statement between Physician's National Risk Retention Group, Inc, and Builders & Contractors, Ltd." reflecting the alterations Moore and O'Keefe had discussed. Also in November 1991, O'Keefe proposed to Moore that the $527,105.00 in Moore's trust be used by Moore.

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Beginning in or about November 1991 and continuing to in or about October 1993, Moore, with O'Keefe's knowledge and direction, advised his client, the Louisiana Department of Insurance, concerning the performance of the PNRRG/BCI contract in a manner which yielded to O'Keefe's personal wishes and suggestions as expressed by him to Moore. During this period, Moore accepted assurances from O'Keefe at face value as to the performance of the obligations under the purported PNRRG/BCI contract, and caused no independent audits to occur. Beginning in or about the spring of 1992, and with O'Keefe's knowledge, Moore spent the $527,105.00 which had been placed in his trust in order to satisfy his own obligations.

In or about October 1993, circumstances independent of O'Keefe and Moore's control caused questions to be raised about the validity of the contract between PNRRG and BCI. Specifically, attorneys representing former officers or directors of PNRRG questioned whether or not the contract between PNRRG and BCI had been validly entered, and whether or not the funds entrusted to the account of Michael O'Keefe had been managed in accordance with the contract or had been diverted. This inquiry began the uncovering of facts which showed that Builders and Contractors, Ltd, had no knowledge of the purported agreement of reinsurance, had received no funds in connection therewith, and had not reported this transaction to its own accountants and auditors because of its ignorance of the contract's existence. Further investigation of O'Keefe and Charles Donaldson, who had purported to act as BCI's agent in the transaction, has confirmed that O'Keefe was aware of Donaldson's concealment of the transaction from BCI.

When facts concerning the invalidity of the BCI contract began to come to light, Johnny Moore, who was ignorant of the circumstances showing the invalidity of the contract, contacted the offices of the United States Attorney and the Federal Bureau of Investigation in the Middle District of Louisiana and offered his cooperation.

Moore was interviewed and, without requesting any immunity or other consideration for himself, admitted his

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complicity with Michael O'Keefe, Sr. in the action set forth in substance in the bill of information.

Moore's action in coming forth was precipitated by a meeting with Michael O'Keefe in which O'Keefe suggested that Johnny Moore help him stonewall the attorneys who were seeking further information about the Builders and Contractors transaction and further suggested that Moore write and backdate a false check in order to falsely represent to the Louisiana Department of Insurance that he had transferred the $527,105.00 to Builders and Contractors rather than having spent it.

Johnny Moore was requested to consensually audio tape, both telephone and face-to-face conversations between himself and Michael O'Keefe on the subject of Builders and Contractors. In a conversation on October 27, 1993, Michael O'Keefe and Johnny Moore referenced their prior discussion about the check, and O'Keefe made an alternative suggestion that he could get Builders and Contractors to recognize a past transfer of investments from Moore that had not, in fact, occurred.

In a conversation at Michael O'Keefe's residence on October 28, 1993, Moore said it was his intention to pay back the money which he considered a loan. O'Keefe said, "Sure, sure, sure. There is no doubt about it." O'Keefe also proposed that he could have a third party intercede with the insurance commissioner on Johnny Moore's behalf to keep Moore's job and limit the dissemination of information about the Builders and Contractors transaction. O'Keefe also told Johnny Moore that he did not want others hearing different stories from Moore and himself about the Builders and Contractors negotiations. Moore continues to cooperate in the ongoing investigation.

Moore also pleaded guilty to public bribery, in violation of La. Rev. Stat. 14:118, in the 19th Judicial District Court for the Parish of East Baton Rouge, State of Louisiana, in that "While he was an attorney for the Louisiana Department of Insurance, he committed public bribery by receiving $527,105 from Michael O'Keefe, Sr." The factual basis for the guilty plea was virtually identical to the factual basis in Moore's federal case. Exh. T-37, O.

Insurance did not receive any of the money in Moore's trust account.

Associated Insurance Consultants, Inc. (AIC), a company owned by Schmidt, Bennett, and O'Brien, signed a "secret"[6] management contract with Builders and Contractors with O'Keefe acting as AIC's attorney. *See United States of America v. O'Keefe*, No. 99-30082 (5th Cir. Sept. 25, 2000). Under the terms of the management contract, AIC was appointed "to act as the general business manager and consultant for the assumed PNRRG business for and on behalf of Builders." Exh. T-19. Builders and Contractors agreed to pay AIC 12.5% of the gross premium ceded to Builders from PNRRG for administration, 7.5% of the gross premium ceded to Builders from PNRGG [sic] for consulting services, and an amount equal to 90% of the profit on the PNRRG assumption.[7] *Id.* AIC agreed to pay Captive Managers, a Bahamian company owned by Donaldson, a brokerage commission in the amount of $150,000 on or before January 1, 1992. *Id.* It was stipulated by all parties that, as of September 1993, fees of

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[6] "Defendants failed to disclose to the DOI and the PNRRG board that they would realize millions of dollars through their management of the reinsurance plan, and at one point denied that they would benefit financially from their efforts for the physicians." *United States of America v. O'Keefe*, No. 99-30082 (5th Cir. Sept. 25, 2000).

[7] The agreement defined profits as "the sum of the gross premiums ceded to Builders plus all investment income less the sum of incurred losses, plus incurred allocated loss expense, plus thirty-six percent (36%) of the gross premium ceded to Builders, and plus any prior profit payment of AIC." Exh. T-19

"The 'profits' were funds available because defendants had canceled the Sphere Drake excess coverage contract, canceled coverage for physicians, and refused to pay claims. [Builders and Contractors], the company that was supposedly behind the reinsurance program, received no funds. These 'profits' vastly exceeded the amount paid in claims." *United States of America v. O'Keefe*, No. 99-30082 (Sept. 25, 2000).

$1,908,487 had been paid to AIC and $5,644,879 in PNRRG's assets intended to fund a new risk retention group flowed from the O'Keefe trust account to Captive Managers in the Bahamas and back to AIC. Exh. T-22 and T-23. PNRRG funds of $5,279,578 were transferred to the personal bank accounts of Schmidt, Bennett, and O'Brien. Exh. T-23.

II. PROCEDURAL HISTORY

A. Grant of New Trial and Denial of Motion for Judgment of Acquittal by Judge Sear

After trial in Judge Sear's court at which the jury returned guilty verdicts on various counts, Judge Sear[8] granted the defendants motion for a new trial "because it found that Donaldson falsely accused O'Keefe of participating in the alteration of the minutes,[9] and that the government knew about the falsehood because the two prosecutors gave inconsistent answers as to whether they learned of the falsehood prior to trial." *United States of America v. O'Keefe*, 128 F.3d 884, 889 (5th Cir. 1997). Moreover, the court found that there were other factors

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[8] After granting the new trial, Judge Sear disqualified himself, and the case was assigned to the undersigned.

[9] The "minutes" are Builders and Contractors' shareholders meeting minutes on December 19, 1988, which were altered in 1993 to make it appear that Donaldson had the authority to participate in reinsurance for five years thereafter and, thus, to enter the contract between PNRRG and Builders and Contractors. A pre-trial Federal Bureau of Investigation (FBI) 302 report prepared from the notes of Special Agent Susan Phillips, based on a telephone interview with Donaldson, stated that O'Keefe suggested that the minutes be altered. At trial, Donaldson admitted that he falsely accused O'Keefe of participating in the alteration of the minutes and that he, Donaldson, had altered the minutes.

warranting a new trial: 1) "the government's release of the FBI 302 reports to the defense complied with the Jencks Act, but did not comply with the government's obligations under *Brady v. Maryland*, 83 S.Ct. 1194 (1963);" 2) "another key government witness, Moore, often changed his testimony, which became significant in light of Donaldson's false testimony;" and 3) "the prosecution had redrafted the indictment[10] in an attempt to mislead the defense by deleting counts connected to the minutes." *Id.*

Judge Sear denied the Rule 29 motion for judgment of acquittal of O'Keefe, Schmidt, Bennett and O'Brien based on the sufficiency of the evidence to support their convictions on any count of the indictment. Judge Sear found that there was sufficient evidence to support the jury's finding that the defendants "entered into a scheme or artifice to defraud that was substantially the same as the one described in the indictment."

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[10] "[D]efense counsel and the government conferred prior to trial regarding the indictment as a result of various pretrial motions made by the defense contesting the statement in an earlier version of the indictment charging that O'Keefe had knowingly included the false minutes in an affidavit he presented to a Louisiana state court." *United States v. O'Keefe*, 128 F.3d at 895. "The government sent the defense a letter conceding that Donaldson had altered the minutes by himself." *Id.* The grand jury returned a second superseding indictment on February 2, 1996. At trial, the government moved to dismiss five counts of the second superseding indictment (counts 3, 9, 10, 11 & 13). The defendants did not object to the motion to dismiss these counts or raise the question of the necessity to redact the "overt acts" portions of the indictment which related to these dismissed counts. *See* Order and Reasons, October 6, 1998 at 2 n.1 (denying motion for a new trial) (Lemmon, J.). The prosecutors and other members of the prosecutorial team presented affidavits to the Court of Appeals stating that the indictment was republished to narrow the issues, not to mislead the defense. *United States v. O'Keefe*, 128 F.3d at 896 n.9.

Judge Sear denied Schmitz's Rule 29 motion challenging his conviction for mail fraud on grounds that the jury returned an inconsistent verdict by acquitting him of the scheme set forth in the conspiracy charge and convicting him of the substantive count of mail fraud. Judge Sear found that the argument was foreclosed by this circuit's precedent holding that such inconsistent verdicts are acceptable. Judge Sear also found that the evidence was sufficient for a reasonable jury to find that Schmitz "knowingly and willfully entered into a scheme to defraud by virtue of his omissions of material facts and representations concerning the reinsurer and the availability of funds to pay the relevant claim, and that he placed matter in the United States mail in furtherance of that scheme."

B. Reversal of Judge Sear's Grant of New Trial

On appeal, the Court of Appeals for the Fifth Circuit found no violation of *Napue v. Illinois*, 79 S.Ct. 1173 (1959), holding that "the district court abused its discretion by finding that the prosecution altered the indictment in an attempt to mislead the defense because even if the prosecution made such an attempt, the defense had too much knowledge of the minutes to be misled." *United States v. O'Keefe*, 128 F.3d at 895-96. As to the materiality of the falsehoods of Donaldson, the Court of Appeals found that "the falsehoods were sufficiently exposed before the jury to enable the jury to weigh those falsehoods in its deliberations." *Id.* at 896. The Court of Appeals reasoned that the impeachment of Donaldson was the centerpiece of the defense's closing arguments, the district court included a strong cautionary statement in its instructions to the jury, and there was no reasonable probability that the jury

would have reached a different outcome if it had been fully aware of all Donaldson's alleged inconsistencies and falsehoods. *Id.* at 896-97.

Further, the Court of Appeals concluded that, although the delay in turning over FBI 302 reports of Moore and Donaldson may have impaired the defense's ability to effectively cross-examine Donaldson and Moore, the delay did not violate *Brady*. *Id.* at 899. Donaldson's FBI report provided the basis for a "devastating cross-examination," and defense counsel brought out inconsistencies in Moore's testimony, although Moore did not perjure himself. *Id.*

Moreover, the Court of Appeals held that the district court's finding that changes in Moore's testimony, in light of the circumstances of Donaldson's testimony, provided little merit as a basis for a new trial. *Id.* The district court had found that the defendants "could not point to any specific instances of perjury by Moore, and that the changes in Moore's testimony provided ample grounds for cross-examination." *Id.* The defendants had not alleged a violation of *Napue* in connection with Moore's testimony, the inconsistencies were explored on cross-examination, and the district court had considered the inconsistencies in Moore's testimony as an alternative basis for a new trial and concluded that the claims regarding Moore's testimony lacked merit. *Id.*

The Court of Appeals vacated the order granting a new trial and remanded the case to the district court to consider the remaining arguments for a new trial not addressed by Judge Sear: 1) the government's voluntary dismissal of five counts from the indictment (counts 3, 9, 10, 11 & 13) after the government had concluded its case, 2) the alleged "marginal" nature of the evidence, and 3)

the cumulative effect of all the grounds asserted by the defense.[11] This court denied the motion for a new trial initially and on reconsideration. *See* Order and Reasons, October 6, 1998, December 2, 1998.

C. The Second Motion for New Trial

The defendants filed a "Joint Motion for New Trial on Grounds of Newly Discovered Evidence of (1) A Violation of *Brady/Giglio* Resulting from Prosecutorial Misconduct; (2) Violation of 18 U.S.C. § 210(6)(2) [The *Singleton* Rationale]; and (3) the Cumulative Effect of All *Brady/Giglio* Violations." This court denied the motion because the defendants failed to meet the threshold requirement that any of the evidence presented was newly discovered and was unknown at the time of trial, and because the *Singleton* rationale had been rejected in the Fifth Circuit. *See* Order and Reasons, December 17, 1998.

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[11] Because of the seriousness of the allegations of *Brady* violations and because I had been assigned that case after trial, conviction, and the granting of a new trial, I ordered the prosecution to certify that it had complied with its constitutional *Brady* obligation. The prosecution filed a petition for writ of mandamus in the Court of Appeals for appellate consideration of this court's order compelling *Brady* collection and certification. The Court of Appeals denied the government's petition without prejudice and clarified that the remand was for this court "to address narrow questions based solely on the already-developed trial court record." Based on the order of the Court of Appeals, this court addressed the remaining issues in the original motion for a new trial that had not been addressed by Judge Sear. The question of a *Brady* certification did not arise in the current motion for a new trial.

D. Sentencing

Following the rulings on the post trial motions, this count conducted an extended hearing on the defendants' objections to the presentence report. The court sentenced O'Keefe to concurrent terms of imprisonment for a total of 235 months, Eric Schmidt and John O'Brien to concurrent terms of imprisonment for a total of 121 months, Gary Bennett to concurrent terms of imprisonment for a total of 97 months, and Paul Schmitz to probation for a term of 36 months.

E. Direct Appeal

On direct appeal, the Court of Appeals affirmed the convictions and sentences. *United States v. O'Keefe et al.*, No. 99-30082 (5th Cir. Sept. 25, 2000). The Court of Appeals held that the evidence was sufficient to support the convictions of O'Keefe, Schmidt, O'Brien, and Bennett for conspiracy to use mail and wire facilities; to execute a fraudulent scheme to defraud PNRRG, the physicians, and patients making medical malpractice claims; to obtain money under false pretenses; and to deprive PNRRG of its right of honest services of its president, Eric Schmidt.

The Court of Appeals characterized the government's theory of the case, which was supported by the evidence, as a scheme to steal the assets of PNRRG and stated:

> To this end, defendants misrepresented or failed to disclose material facts discussed above. For example, they misrepresented that coverage of PNRRG's physicians would continue and that all claims would be paid by [Builders and Contractors], misrepresented that they would not personally profit from the transactions, failed to

> disclose that they had canceled excess coverage, and failed to disclose their plan to transfer millions of dollars intended to capitalize the new insurance venture to their personal bank accounts. . . . DOI actuary, Scruggs,[12] testified that if the DOI had known that the defendants were going to cancel doctors' coverage, it would not have entered into the reinsurance agreement with defendants and would have saved $8 million for the company in liquidation. We think these misrepresentations and nondisclosures were certainly capable of influencing the PNRRG board and the DOI.

The Court of Appeals rejected Bennett's version of events that Builders and Contractors "was intended to serve only as a temporary place to 'park' the insurance policies of the low risk doctors until a permanent American company could be found"; that the defendants received a large profit because the anticipated claims were higher than the actual claims; that Moore was a thief who stole money and testified for a reduction in sentence; and that Donaldson lied when he was caught misrepresenting his authority to act for Builders and Contractors. The Court of Appeals noted that Donaldson's lies had been rejected as a ground for a new trial, and a rational jury could conclude that Moore was "bribed or at least encouraged by O'Keefe to raid his trust account."

As to the remaining counts, the Court of Appeals affirmed the convictions, holding that the evidence was sufficient to support the conspiracy count, and the

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[12] Michael Scruggs was an employee in the actuarial department of KPMG, the accounting firm hired by the Department of Insurance to perform a financial examination of PNRRG in 1989.

defendants offered no independent reasons why the evidence was insufficient on the other counts. Further, the Court of Appeals concluded that the evidence was sufficient to support Schmitz's mail fraud conviction on count 12 because Schmitz's conduct was part of a scheme to stop paying claims and transfer the assets of PNRRG to the defendants.[13]

E. Present Motion for New Trial

O'Keefe later filed this motion for new trial based on newly discovered evidence, pursuant to Rule 33 of the Federal Rules of Criminal Procedure. O'Brien, Schmidt, Bennett, and Schmitz joined in the motion. The court held an extensive evidentiary hearing, permitting the production and presentation of evidence.

III. DISCUSSION

A. Timeliness of the Rule 33 motion

Because the time limits of Rule 33 are jurisdictional, the court first addresses the timeliness of the motion for a new trial. *See United States v. Bowler*, 252 F.3d 741, 743 (5th Cir. 2001). The timeliness of the Rule 33 motion turns on whether the amended version of Rule 33, effective

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[13] In addition, the Court of Appeals reviewed the argument that Judge Sear failed to instruct the jury on materiality with respect to mail and wire fraud for plain error and found that there was no reversible error. Further, the Court of Appeals held that the court's response to the jury's question was not error because the jury could find the answer by reading the charge, the indictment was not defective, evidence of O'Keefe's prior convictions were properly admitted to prove intent, and the district court did not abuse its discretion in denying the motion for severance.

December 1, 1998, or the pre-amendment version of Rule 33 is applicable. *Id.*

In the enabling statute authorizing the Supreme Court to prescribe rules of procedure and evidence, Congress provides that

> the Supreme Court may fix the extent such rule shall apply to proceedings then pending, except that the Supreme Court shall not require the application of such rule to further proceedings then pending to the extent that, in the opinion of the court in which such proceedings are pending, the application of such rule in such proceedings would not be feasible or would work injustice, in which event the former rule applies.

28 U.S.C. § 2074. The "Commentary on 1988 Revision" recognizes that the Supreme Court "can include a general instruction on retroactivity, but the ultimate determination of whether a new rule is to be applied to proceedings pending when the rule takes effect is left to the court in which such proceedings are pending." *Id.*, commentary.

Prior to December 1, 1998, Rule 33 provided in relevant part: "A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment." Fed. R. Crim. P. 33 (amended 1998). The current version of Rule 33 provides: "A motion for new trial based on newly discovered evidence may be made only within three years after the verdict or finding of guilty." Fed. R. Crim. P. 33. Amended Rule 33 applies to all criminal cases commenced after December 1, 1998, and to all cases pending after the effective date "insofar as just and practicable." *See Bowler*, 252 F.3d at 744-45. Final judgment is measured from the

date the Court of Appeals issues its mandate of affirmance. *Id.* at 744.

The order accompanying the submission of the proposed December 1998 amendments to Congress states:

> That the foregoing amendments to the Federal Rules of Criminal Procedure shall take effect on December 1, 1998, and shall govern all proceedings in criminal cases thereafter commenced and, insofar as just and practicable, all proceedings in criminal cases then pending.

Bowler, 252 F.3d at 744 (quoting Order of April 24, 1998 of the Supreme Court of the United States Adopting and Amending the Federal Rules of Criminal Procedure). Since 1975, the Supreme Court has used almost identical language in submitting amendments to the Federal Rules. *Id.* The language in the enabling act refers to "pending cases" and not merely "pending proceedings." *Id.* at 746.

On March 21, 1996, the jury returned its verdict, and on August 15, 1996 the trial judge granted the defendants' motion for a new trial. On November 11, 1997, the Court of Appeals vacated the judgment granting the new trial and remanded the case for further proceedings and to address the remaining issues in the motion for a new trial. After an evidentiary hearing on alleged *Brady* violations, on October 6, 1998, this court denied the original motion for a new trial, and on December 2, 1998 denied the motion for reconsideration. On December 3, 1998, the defendants filed a motion for new trial based on newly discovered evidence of an undisclosed payment from the government to Donaldson. The court denied the motion for a new trial and sentenced the defendants on January 11, 1999. The Court of Appeals affirmed the convictions and sentences,

and the mandate issued on September 22, 2000. O'Keefe filed the Rule 33 motion on June 3, 2002. Under the amended version of Rule 33, the court would not have jurisdiction to hear the motion for a new trial because this Rule 33 motion was filed more than six years after the jury verdict on March 21, 1996.

Although the case was still pending on the effective date of the amended version of Rule 33, the court finds that the pre-amendment version of Rule 33 applies because of the complicated history of this pre-amendment case. When the Court of Appeals vacated the judgment granting the new trial on November 11, 1997, there were other outstanding issues from the first motion that had not been addressed by Judge Sear, as well as issues in a second motion for a new trial filed by the defendants on December 3, 1998. Once the outstanding issues were resolved, the defendants were sentenced on January 11, 1999, almost three years after the jury returned its verdict. Under the amended versions of Rule 33, the defendants would have been required to file the present motion for new trial by March 21, 1999, only two months after the sentence was imposed and while the direct appeal was pending before the Court of Appeals. The court finds that it is not just and practicable to require the defendants to file this motion for a new trial while the appeal was pending and that to hold the defendants to the three-year-after-verdict limitation of the amended version would result in manifest injustice.[14] Therefore, the pre-amendment

[14] In *Bowler*, the Court of Appeals held that applying the new Rule 33 would be unjust and impractical and applied the pre-amendment version of the rule. 252 F.3d at 746. In *United States v. Erwin*, 277 F.3d 727, 731-32 (5th Cir. 2001), the Court of Appeals applied new Rule 33 to a defendant who filed his motion for a new trial more than thirteen

(Continued on following page)

version of Rule 33 applies; and the court has jurisdiction to hear the motion for a new trial, which was filed timely within two years after the judgment became final.

B. Legal standard for motion for new trial

A new trial based on newly discovered evidence is warranted if the defendant demonstrates that

> (1) the evidence is newly discovered and was unknown to the defendant at the time of trial; (2) failure to detect the evidence was not due to a lack of diligence by the defendant; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence introduced at a new trial would probably produce an acquittal.

Bowler, 252 F.3d at 746. "Unless all factors are met, the motion should be denied." *Id.* Previously known but unappreciated facts couched in terms of new legal theories do not constitute newly discovered evidence. *See United States v. Ugalde*, 861 F.2d 802, 806 (5th Cir. 1988). "[W]here a party fails to call a witness who was available during trial, the testimony of that witness cannot be considered newly discovered evidence." *See United States v. Beasley*, 582 F.2d 337, 339 (5th Cir. 1978).

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years after his conviction because to permit him to file the untimely motion would "circumvent the purpose of the time limitations set forth in the rule." The Court of Appeals noted that there was no injustice in applying the new rule because Erwin's motion for a new trial would still be time-barred under the pre-amendment version of Rule 33. In this case, the defendants are not time-barred under the pre-amendment version, and there would be an injustice if the new rule is applied.

Additionally pertinent to this case, when a motion for new trial based on newly-discovered evidence raises a *Brady* claim, the court applies the three-prong test of *Brady* to determine whether a new trial is appropriate. *See United States v. Runyan*, 290 F.3d 223, 247 (5th Cir. 2002). To establish a due process violation under *Brady*, a defendant must show that "(1) evidence was suppressed; (2) the suppressed evidence was favorable to the defense; and (3) the suppressed evidence was material to either guilt or punishment." *Id.*

"[A] conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment. . . . The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Napue v. Illinois*, 79 S. Ct. 1173, 1177 (1959). A *Napue* violation may occur when a prosecuting attorney knows that a witness gives false testimony and does not correct it. *See Giglio v. United States*, 92 S. Ct. 763, 766 (1972). The grant of a new trial based on a *Napue* violation is proper if (1) the statements are shown to be actually false; (2) the prosecution knew that they were false, and (3) the statements were material. *See United States v. Blackburn*, 9 F.3d 353, 357 (5th Cir. 1993).

Under *Brady* or *Napue*, materiality is defined in terms of a "reasonable probability" of a different outcome. *See Kyles v. Whitley*, 115 S. Ct. 1555, 1566 (1995). "A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" *Id.*

C. Substance of defendants' allegations on motion for a new trial

1. Moore's perjuries

The defendants argue that the most damaging testimony in this case was Johnny Moore's assertion that O'Keefe bribed him by telling him that $527,105 deposited in Moore's trust account was for Moore's use. At trial, Moore testified that he believed that O'Keefe had the authority to let him use the money. Moore testified that, in December 1991, he called a meeting with Michael Scruggs of KPMG and L.D. Barringer, a partner in Heritage Management, the deputy conservator of PNRRG, to go over the calculations for the allocation of PNRRG's assets. Moore stated that he was left with the impression that they were in agreement that the money would he allocated to Builders and Contractors to cover the return of any unearned premiums and for accounts receivable. Moore explained that he knew from past experience with Heritage Management and Associated Auditors, Inc., the corporation that managed PNRRG, that they knew exactly what the unearned premiums and accounts receivable were because they supplied all of the numbers. Therefore, he was convinced the money was properly allocable to Builders and Contractors.

The defendants assert in this motion that they discovered new evidence of Moore's perjury during Barringer's deposition on December 5, 2001, in a civil case in which O'Keefe is a defendant. The defendants contend that in his deposition Barringer categorically denied that he was present at any meeting described by Moore and that he never heard of an agreement that the funds belonged to Builders and Contractors. The defendants argue that Moore concocted the story of the meeting in which there

was an agreement that the funds belonged to Builders and Contractors, not PNRRG, in order to confer authority over the money to O'Keefe. The defendants contend that the testimony refuting Moore's story was critical because the government's theory that Moore had been corrupted by O'Keefe's placing the money in Moore's trust account is now unsupported.

The controversy over whether O'Keefe had authority over the funds in Moore's trust account because the money belonged to Builders and Contractors is not a new one and has previously been raised before the grand jury, at trial, and on appeal. Moore testified before the grand jury that O'Keefe told him that the money in Moore's trust account was under his control because it belonged to Builders and Contractors and that the money was for Moore's use. Exh. T-37, K, 12-13. Moore testified that he was the representative of the Commissioner of Insurance in the liquidation of PNRRG and was entrusted to safeguard the public by assuring that medical malpractice coverage was provided for the PNRRG physicians. Moore testified that the money was a bribe, and he knew that he would be asked by O'Keefe to do things in the future in return for the money.[15] *Id.* T-37, K, 13-14.

At trial, Moore testified that he always believed that the money belonged to Builders and Contractors. He

[15] In addition, Moore had an interest in obtaining O'Keefe's help to maintain his position with the Department of Insurance. Moore testified that he discussed with O'Keefe the effect that the election of Jim Brown as Commissioner of Insurance would have on Moore's position. T-37, K, 6. According to Moore, O'Keefe assured him "that he knew Jim Brown well, they were friends, and that he was pleased with my behavior and he would do whatever he could to make sure that I remained in the position, the attorney for the commissioner." T-37, K, 6.

referred to a meeting at the and of December at which Mike Scruggs, L.D. Barringer and others "talked accounting language and . . . seemed to be in agreement." As a result of that meeting, Moore had no doubt that it was Builders and Contractors' money.

Moore reiterated at the evidentiary hearing on this motion that he always thought that the money belonged to Builders and Contractors. He reasoned that historically Builders and Contractors' numbers had always been right and that Heritage's numbers were always wrong.[16]

In addition to Moore's testimony that he believed that the money belonged to Builders and Contractors, John O'Brien testified at trial that, although initially the ownership of the money was subject to a dispute, because the amount of the unearned premiums corresponded with the number he believed to be correct, he was convinced the money belonged to Builders and Contractors. Tr. Vol. 11, 110-11.

Moore's testimony is further supported by a May 4, 1993 letter to Moore from A.J. Alessi, the controller for AIC, advising that the "premium accounting side of the Builders/Physicians reinsurance agreement is closed." Alessi identified the $527,105 in Moore's trust account as "Escrow Due Builders." Exh. T-12.

In their argument on this motion for a new trial, defendants stress the importance of the inconsistency of

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[16] Moore's testimony at the hearing was clearly manipulative. His memory was convenient, and the testimony was inconsistent within itself. Judge Sear's characterization that the jury saw a witness whose testimony was "eager" and "ever-changing" is equally applicable to Moore's testimony at the hearing.

Barringer's testimony in the civil case with Moore's trial testimony regarding the ownership of the funds. The trial record reflects that Barringer had been subpoenaed, but was not called to testify at trial. Although Barringer's civil deposition as well as Moore's civil deposition both contradict Moore's trial testimony, the Court of Appeals has foreclosed this contradiction as grounds for a new trial in its prior ruling on the appeal of the denial of the first motion for a new trial. The Court of Appeals stated:

> O'Keefe does not explain convincingly why it matters whether the funds were held in trust for [Builders and Contractors] or PNRRG.
>
> This evidence, even if newly discovered, does not change the fundamental facts that Moore admitted he stole money from his trust account with O'Keefe's blessing, and had pleaded guilty to such and was testifying pursuant to a plea agreement.

Moreover, even it there were inconsistencies between Moore's testimony and Barringer's civil deposition testimony, in order for it to be considered newly discovered evidence, the defendants must show that Barringer was unavailable at trial. *See Beasley*, 582 F.2d at 339. Glenn Burns, counsel for O'Keefe, spoke by telephone with Barringer prior to trial on February 22, 1996. Barringer informed Burns that Burns would have to speak with Kip Wall, counsel from the Department of Insurance, to obtain permission to speak with Barringer. Burns obtained Wall's permission and called Barringer; however, Barringer did not return the call prior to the start of trial on March 4, 1996. When Burns and Barringer spoke on March 7, 1996, Burns informed Barringer that he would not be called as a

witness at trial, even though he had received a subpoena, and was still under subpoena when Johnny Moore began his testimony at trial. Exh. T-34.

When Moore testified at trial about the meeting attended by Scruggs and Barringer, no attempt was made by Burns or counsel for any of the codefendants to call Barringer to ask him about the meeting, and Burns did not question Scruggs about the meeting. Accordingly, the evidence regarding ownership of the $527,105 by Builders and Contractors and his denial that he and Scruggs met to discuss that ownership adduced at Barringer's deposition does not constitute "newly discovered evidence."[17]

2. Moore's "deal" with the government

The defendants argue that the government violated *Brady* by withholding evidence of a deal with Moore. The defendants contend that Moore attempted to deceive the jury into believing that his testimony was not induced by any "deal" with the government. They argue that Moore initially confessed to his crime and stated that he was not aware of any wrongdoing by others. The defendants contend that later in the plea negotiations Moore adopted the government's theory that O'Keefe bribed him and lied in order to limit Moore's exposure and to obtain a favorable plea agreement in federal and state court. They contend that the missing 302 or rough notes of the initial interview would support their argument, and that exhibits 9, 10, and 11, which were revealed to defendants for the

[17] Because of this ruling, the impact of these inconsistencies on other inconsistencies brought out at trial is not relevant to this motion.

first time at the hearing on this motion, support that theory.

Moore initially telephoned Assistant United States Attorney Edward Gonzales and asked for an appointment to discuss PNRRG.[18] Moore knew that the legitimacy of the $18,000,000 transaction between PNRRG and Builders and Contractors was being questioned. Moore met with Gonzales and Agent Susan Phillips[19] on October 21, 1993. At the hearing on this motion, Moore testified that he went to the United States Attorney's office to tell Gonzales that he had appropriated the $527,105 for his own use, "let them investigate it, and let the chips fall where they may." He explained that he related what he had done, but he did not know what crime, if any, his actions constituted or what the outcome of his confession would be.

On January 8, 1994, a state warrant was issued to search Moore's office and, on January 20, 1994, a Louisiana Department of Justice warrant of arrest was issued based on accusations of theft of the funds in his trust

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[18] Gonzales testified at the hearing on this motion that the Atlanta office of the FBI was investigating activities of the Board of Directors regarding the demise of PNRRG. A week prior to Moore's call, Gonzales met with two attorneys from New Orleans and one from Baton Rouge representing the Board of Directors of PNRRG. The attorneys had information that Builders and Contractors in Europe had no knowledge that Charles Donaldson had entered a contract on behalf of Builders and Contractors in the Bahamas. A file on Donaldson was opened in the Middle District of Louisiana on October 4, 1993.

[19] Susan Phillips was the special agent with the FBI assigned to the original PNRRG case in Baton Rouge. The Eastern District and the Middle District worked out an arrangement whereby the Middle District would prosecute the case against Johnny Moore and Charles Donaldson, and the Eastern District would prosecute the case against O'Keefe and his codefendants.

account. Between those two events, Moore, who was previously unrepresented, retained Thomas Damico to represent him. Moore voluntarily surrendered to the state authorities, and Damico spoke with District Attorney Douglas Moreau of the Nineteenth Judicial District. Moreau decided to wait to see what action the federal authorities took before proceeding against Moore in state court.

Moore ultimately entered a plea agreement with the federal government on November 10, 1994, to one count of mail fraud in violation of 18 U.S.C. § 1341. The government agreed to file a motion for a downward departure under § 5K.1 of the Sentencing Guidelines if Moore provided complete and truthful information,[20] failure of which would subject Moore to prosecution for any offense covered by the agreement.

Moore also pleaded guilty in state court to one count of public bribery. *See* Footnote 5. The District Attorney agreed to recommend to the state court that any state sentence would be coterminous with the federal sentence.

The defendants argue that Moore presented one version of events to the government at the initial meeting, which did not implicate O'Keefe, and later changed his

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[20] At rearraignment, Agent Phillips testified concerning the investigation of Moore. She stated that Moore came forward, was interviewed, and admitted complicity with Michael O'Keefe without requesting immunity or other consideration for himself. Moore decided to offer the information to the government when O'Keefe suggested that Moore help him with attorneys who were seeking information about the Builders and Contractors transaction. In a taped conversation, O'Keefe proposed that he have a third party intercede with the Insurance Commissioner to keep Moore's job and limit the dissemination of information about the Builders and Contractors transaction.

story, implicating O'Keefe in order to make a "deal" with the government, and that Moore subsequently created information as necessary to obtain a favorable plea agreement.

At the hearing on this motion, the defendants moved for the production of any notes of the government's initial interviews with Moore.[21] In response to the request, the court conducted an *in camera* inspection of Moore's cooperating witness file and other files from the FBI, United States Attorney, and the Attorney General to determine whether any of these documents should have been produced pre-trial and whether non-production of any of these documents constitutes *Brady* or *Napue* violations.

The court examined Phillips' cooperating witness file for Moore and found no 302 report or rough notes for Moore's initial interview on October 21, 1993. Gonzales testified at the hearing that he had no specific recollection that he took notes during Moore's first interview, but that Agent Phillips was present and usually took notes. Agent Phillips could not remember if there were rough notes or a 302 report of the initial visit, but that ordinarily both would have been created. No 302 or rough notes of the initial interview have ever been produced.

Because of the inability of the government to produce 302's or rough notes from the initial interview, the court ordered the government to produce two administrative memoranda prepared by Agent Phillips on October 25, 1993 and one memorandum prepared by Phillips on

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[21] There was a stipulation that the Johnny Moore cooperating witness file was turned over to Judge Sear at trial for *in camera* review, but the administrative file was not.

December 9, 1993, none of which were part of the cooperating witness file. *See* T. 44, exh. 9, 10, 11.

According to Phillips, the purpose of the first memorandum of October 25, 1993, was to recommend that the case of Douglas Crucet,[22] d/b/a Physicians National Risk Retention Group, Inc. et al. be reopened to determine if funds had been diverted from PNRRG after the company was placed into liquidation. T. 44, exh. 9. Phillips' October 25, 1993 memorandum states:

> The above captioned case was closed on July 29, 1993, when it was determined that the subjects of PHYSICIANS NATIONAL RISK RETENTION GROUP, INC. (PHYSICIANS NATIONAL) did not falsify the discounting of loss reserves on financial statements they submitted to the LOUISIANA DEPARTMENT OF INSURANCE (LDI) without the knowledge of the LDI. A review of company records revealed that Commissioner of Insurance SHERMAN BERNARD wrote a letter in July 1987, authorizing PHYSICIANS NATIONAL to discount loss reserves.
>
> On October 21, 1993, a cooperating witness provided information that $18,632,105 was diverted from PHYSICIANS NATIONAL after the company was placed into liquidation on November 12, 1991.
>
> On October 18, 1991, BUILDERS AND CONTRACTORS INSURANCE COMPANY, LIMITED of the Bahamas, (BCI), purportedly entered into

[22] Crucet was a principal of Enterprise Corporate Services and Medical Perspective, Inc. in Atlanta, companies which had management contracts with the Physicians Reliance Association, Inc., PNRRG's parent company.

a reinsurance contract with PHYSICIANS NATIONAL. Under the reinsurance contract PHYSICIANS NATIONAL negotiated an amount of $18,105,000 or $18,632,105 in cash and assets to be transferred to BCI and BCI agreed to reinsure all of PHYSICIANS NATIONAL'S insurance policies with inception dates of 9/1/90 and thereafter. BCI and PHYSICIANS NATIONAL disputed the difference between the $18,105,000 and $18,632,105 which amounted to $527,105 that PHYSICIANS NATIONAL was to transfer to BCI. JOHNNY MOORE, who was a contract attorney hired by the LDI to liquidate PHYSICIANS NATIONAL, deposited the $527,105 into his trust account and was to hold the funds until the dispute was settled. However, MOORE spent the $527,105 for his personal benefit. MICHAEL O'KEEFE, who is an attorney for ASSOCIATED AUDITORS, placed $441,810 of the funds that were supposed to be sent to BCI into his bank account. The cooperating witness believes that the $18,632,105 was diverted from PHYSICIANS NATIONAL because he does not believe BCI is a legitimate company.

Attorney CAREY LEONARD of UNWALA LEONARD & COMPANY, Counsel and Attorneys at law, Bahamas, reviewed the Register under the name BCI and determined that BCI has not filed any documentation since November 1990 and has not paid its fees. LEONARD believes that BCI is therefore not in good standing.

Dr. PETER KISLER who is the deputy chairman of BCI said that BCI never authorized anyone to enter into a reinsurance agreement with PHYSICIANS NATIONAL. KISLER also said that BCI never received any funds or other assets out of this agreement. KISLER also advised

> that this transaction never appeared on the books and records of BCI in 1991 or 1992.
>
> It is recommended that the above captioned case be reopened and assigned to SA SUSAN V. PHILLIPS to determine if funds were diverted from PHYSICIANS NATIONAL after the company was placed into liquidation.

The stated purpose of the second memorandum regarding Douglas Crucet et al., dated October 25, 1993, was to request emergency authority to use an electronic body recorder to record conversations between Moore and O'Keefe that were expected to occur on October 26, 1993. T. 44, exh. 10. The second Phillips memorandum provided the following additional information:

> In October 1993, PRICE WATERHOUSE auditors and civil attorneys began asking questions about the missing $527,105 that was deposited into MOORE'S bank account. On October 18, 1993, O'KEEFE told MOORE that he had things worked out, and MOORE should not have any problems with the $527,105. O'KEEFE devised a plan in writing in which to deceive the auditors and the civil attorneys by representing that the $527,105 had been sent to BCI. O'KEEFE suggested that MOORE write a $1,000 check payable to BCI for interest payments on a loan. O'KEEFE asked MOORE to give him the $1,000 check so that he could quickly run the check through BCI's bank account. O'KEEFE then suggested that MOORE write another check in the amount of $527,105 which would not be negotiated. O'KEEFE said he would copy the back of the $1,000 check and the front of the $527,105 check and present them to the auditors and the civil attorneys. O'KEEFE presented this plan to

MOORE in writing and then put the piece of paper in his notepad.

On October 23, 1993, O'KEEFE requested another meeting with MOORE to help him work out his problems.

MOORE had agreed to consensually monitor conversations with O'KEEFE in an attempt to obtain admissions from O'KEEFE regarding the above matter. MOORE is willing to testify in court and will execute an FD-472 and FD-473.

Assistant United States Attorney (AUSA) EDWARD J. GONZALES, Middle District of Louisiana, has been informed of the above matter and concurred with the consensual recording of conversations between JOHNNY MOORE, MICHAEL O'KEEFE and others yet unknown. AUSA GONZALES did not consider entrapment to be a matter of concern.

In the third memoranda dated December 9, 1993, Phillips recommended that a case be opened with the caption "Michael O'Keefe, Eric Schmidt, d/b/a, Associated Auditors, Inc.; Charles Donaldson, d/b/a Builders and Contractors Insurance Company, Limited of the Bahamas; Johnny C. Moore, Contract Attorney, Louisiana Department of Insurance." T. 44, exh. 11. The memorandum provides the history of PNRRG and the Department of Insurance's decision to liquidate it after several months of solvency hearings. The remainder of the memorandum reiterates the details contained in the first October 25th memorandum, which is designated as T-44, 9. In addition, the memorandum states that "[o]n November 17, 1993, Assistant United States Attorney EDWARD J. GONZALES requested that the FBI open a case regarding the above matter."

The court also ordered the production from Moore's cooperating witness file of a "Request to Open and Assign Informant/CW" prepared by Susan Phillips and dated October 27, 1993, six days after the initial meeting with Moore. T. 44, exh. 14. Section 9 of the document states:

> Subject is in a position to furnish valuable information regarding (list primary coverage first): fraud by wire, corruption of state & local public officials, money laundering.

In addition to the documents ordered produced, the court heard testimony concerning the initial interview with Moore. Gonzales stated that Moore told him and Phillips in one of the earlier meetings that Moore expressed to O'Keefe a fear of losing his job when there was a change in the office of Insurance Commissioner. Gonzales recalled that Moore stated that O'Keefe assured him that he would try to protect his job.[23] At another meeting between October 1993 and January 1994, before Moore retained counsel, Gonzales recalled that Moore told him and Phillips that O'Keefe purported to have authority from Builders and Contractors to give him use of the money that was being held in his trust account. Gonzales already had information that the contract with Builders and Contractors in the Bahamas was fraudulent, and he was interested in additional information concerning the reinsurance contract and Moore's handling of the trust account funds.

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[23] Moore and O'Keefe discussed the question of his job in one of the consensual tape recordings made by Moore on October 28, 1993. JM, Tab 9, p. 17.

There is nothing "new" in the documentary and testimonial evidence which supports the defendants' contention that the "evolution" of Moore's cooperation to allege bribery charges against O'Keefe was induced by a "deal." The two administrative memoranda of October 25, 1993 indicate that the government was aware of the diversion of PNRRG's funds through Builders and Contractors and O'Keefe's possible involvement. Four days after the initial October 21, 1993 meeting with Moore, Phillips requested emergency authority to record conversations between Moore and O'Keefe. In November 1993, Gonzales recommended that the FBI open a case against Moore, O'Keefe, and others; and in December of 1993, Phillips made the recommendation. Phillips' request to open Moore's cooperating witness file on October 27, 1993, indicates that Moore was "in a position to furnish valuable information regarding fraud by wire, corruption of state and local public officials, money laundering." Further, Gonzales' testimony at the hearing corroborates that Moore gave information early in the interview process about using the money in his trust account with O'Keefe's knowledge and under his authority. The reports in the administrative record refute rather than support defendant's contention that O'Keefe was not implicated early on in the communications between the government and Moore.

The documents produced at the evidentiary hearing do not support a *Brady* claim because they do not contain evidence favorable to the defense, and are not "newly discovered" because, if produced at a new trial, would not "probably produce an acquittal." Therefore, the defendants have not demonstrated that a new trial is warranted based on this evidence.

The defendants further argue that there are three arrangements of which they learned for the first time during this hearing on the motion for a new trial that constitute *Brady* material:

> 1) The precise dates of Moore's cooperating witness status,
>
> 2) The state prosecutor's forbearance from January 1994 to March 1995, and
>
> 3) The §5K agreement with the government for a downward departure as of September 15, 1994, before the plea agreement of November 10, 1994.

The defendants point out that the jury was not aware of any of these arrangements.

Information contained in documents 9, 10, and 11 concerning Moore as a cooperating witness does not constitute *Brady*, material because it was not suppressed. The defendants knew at trial that Moore was a cooperating witness because they received an FBI insert which stated that, on November 8, 1993, the cooperating witness provided information to Susan Phillips. T-44, exh. 2, second document. The defendants questioned Phillips and Moore about the document and knew that the information in the document came from Moore. Although the administrative file containing documents 9, 10, and 11 were not produced to Judge Sear for *in camera* review, the cooperating witness file which was inspected by Judge Sear contained the information that Moore was a cooperating witness, and defendants were aware of that fact.

Further, any failure to inform the defendants that negotiations concerning the plea agreement were reached in mid September 1994, rather than as of the November

10, 1994 plea agreement, does not violate *Brady*. The defendants were aware at trial that the plea agreement between Moore and the government contained a provision that the government would file a section 5K1.1 motion if Moore provided complete and truthful information to the government and the grand jury. The defendants have not shown that the fact that the agreement was reached in September is favorable to the defense or that it is material to either guilt or punishment.

The defendants have not demonstrated that failure to reveal forbearance of the state prosecution for public bribery is a violation of *Brady*. The defendants acknowledge that they were aware prior to trial that Moore pleaded guilty to the state charges on March 20, 1995, the same day that he pleaded guilty in federal court, and defendants were also aware that state charges were pending from at least January 20, 1994, when the state warrant was issued. The evidence was therefore not suppressed, and a *Brady* violation did not occur.

3. Newly discovered evidence in Barringer's 302 and civil deposition testimony

The defendants contend that newly discovered evidence in Barringer's 302 and civil deposition testimony warrants a new trial. They argue that the new evidence supports the defense's theory that there was no fraud because the cancellation of the policies of many of the doctors was proper, Moore's testimony that it was Heritage Management's duty to perform due diligence was false, the defendants intended to make a profit, and the commutation of Sphere Drake was prudent.

a. Barringer's 302

(1) Cancellation of policies

The defendants contend that Barringer's 302 provides newly discovered evidence that the agreement between Builders and Contractors and PNRRG did not preclude the cancellation of many of the doctors. The defendants contend that the importance of the 302 report is that, in response to Barringer's concern about the cancellations, Moore answered that the doctors would be moved into a new risk retention group. The relevant portion of the 302 report of Barringer's interview with FBI Agents Martha Fitzpatrick and Stephen Hooker states:

> Prior to the contract, BARRINGER asked MOORE how they were going to protect against cancellations to which MOORE stated that O'KEEFE's group would keep the doctors and finally move them into another company.

The defendants' argument must be viewed against the backdrop of Judge Sear's denial of the Rule 29 motion for judgment of acquittal of O'Keefe, Schmidt, O'Brien, and Bennett based on the sufficiency of the evidence of the scheme to defraud, in which he addressed, *inter alia*, the issue of the cancellation of the physicians, *see United States v. O'Keefe*, No. 95-0106, Doc. #318 at 35-37 (E.D.La. Aug. 15, 1996):[24]

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[24] On direct appeal, the Court of Appeals rejected the argument that the evidence was insufficient to establish that the defendants made material misrepresentations and omissions. "For example, they misrepresented that coverage of PNRRG's physicians would continue and that all claims would be paid by BCI." *United States of America v. O'Keefe*, No. 99-30082 (5th Cir. Sept. 25, 2000).

Also cited by the government is evidence that the defendants misrepresented that certain claims would be the reinsurers' sole responsibility, then proceeded to cancel physicians and reject claims that should have been their responsibility. Michael Scruggs testified that it was the common understanding when the reinsurance agreement was negotiated that only those claim files that had been opened as of the date of the agreement would remain the responsibility of PNRRG in liquidation; all other claims would be the responsibility of the reinsurers. The sum to be transferred to the reinsurers was based on the claims which the DOI and Heritage Management understood to be taken on by the reinsurers and the amount necessary to protect the physicians going forward.

According to Scruggs, the defendants subsequently refused to pay certain claims which they should have based on the common agreement. When O'Keefe was asked to rectify the situation, he refused. Further, the evidence showed early cancellation of a large number of the physicians, contrary to what Scruggs and Moore testified was the purpose for entering the agreement.[25] When the physicians were cancelled early (including those who were purportedly going to join the new risk retention group being formed by the defendants), they received only their personal contributions to the premium; the remainder stayed in the trust and ultimately went to the defendants as

[25] At trial, Moore testified that Barringer inquired about the cancellation of doctors in contravention of the agreement that they would be covered. Tr. Vol. 2, 203. Moore stated that O'Keefe told him that some of the doctors were cancelling their policies because they wanted to do business with another insurance company. *Id.*

profit. Scruggs testified that there was no reason to pay the defendants $8 million to cancel physicians when the DOI could have done it just as easily without relinquishing the money. Further, the reason no action was taken by the DOI upon discovering that the defendants were cancelling physicians was because Johnny Moore, the individual responsible for taking such action, did not do so because Michael O'Keefe had (1) promised to use his political influence to help Moore retain his position and (2) told Moore he could use $527,105 placed in trust with Moore as part of the reinsurance agreement.

The defendants contend that the jury could not have relied on Scruggs' testimony concerning what claims would be the responsibility of the reinsurers because Scruggs, on cross examination, retracted his testimony on the issue and admitted that there was a valid dispute over what claims the reinsurers were supposed to cover.[26]

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[26] Scruggs testified that, if the physicians were canceled before the policy expired, the Department would be transferring too many assets to Builders and Contractors. Tr. Vol. 8, 100. Cancellation of physicians "was completely contrary to the spirit of the agreement and not contemplated in the amount of the assets that were transferred." *Id.* at 100-01. On cross-examination, Scruggs clarified:

> I'm saying basically if the state had gone and canceled the physicians, then the state would have returned-for the sake of discussion, let's say there was an $8 million unearned premium reserve. Well, $8 million would have gone out of the estate, to the physicians, but under this agreement, the Department agreed to send, say, $16 million worth of assets over the reinsuring entity to settle claims that would arise out of that $8 million unearned premium reserve, as it was earned. If there was ever any expectation that the policyholders were going to be canceled, the Department of Insurance would have never entered into the contract. They could

(Continued on following page)

> It is clear, from reviewing the testimony of Scruggs cited by the defendants, that Scruggs did not expressly or implicitly retract his testimony concerning BCI's refusal to pay claims. He simply testified that O'Keefe had changed his position on what claims were the responsibility of the reinsurers and that the contract had an arbitration clause for deciding disputes. Drawing all inferences and credibility choices favoring the government, a reasonable jury could have found a scheme to defraud.

In view of the evidence at trial concerning the intent to preserve coverage for the policyholders, the defendants have not demonstrated that the evidence in Barringer's 302 that the doctors would be protected against cancellations because "O'Keefe's group would keep the doctors and finally move them into another company" is favorable and that there is a reasonable probability that there would have been a different outcome if Barringer's 302 report had been presented to the jury. Accordingly, they have not established a *Brady* violation on this issue.

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have canceled them a lot cheaper instead of just giv[ing] $8 million to someone to do it.

Id. at 110.

(2) Moores's perjuries regarding Heritage Management's responsibility to perform due diligence[27]

The defendants argue that the government violated *Brady* by failing to produce Barringer's 302 report, which sets forth:

> BARRINGER stated that he didn't know who would perform the due diligence on the reinsurer, however, MABRY had an associate who provided a packet of information on SPHERE DRAKE. O'BRYAN also went to the CPA firm that audits SPHERE DRAKE and received favorable information.

The defendants contend that Moore lied when he testified that Heritage was assigned the task of performing due diligence on the reinsurer to ascertain it was an appropriate company. The defendants argue that Moore's perjury, exonerating himself from breaching his obligation to perform due diligence by attributing the responsibility for due diligence to Heritage Management, had the effect of bolstering Moore's integrity. Had the defense known of Barringer's directly conflicting statement, they would have used it to show Moore lied about his failure to perform his obligation of using due diligence, adding to the series of problems with Moore's credibility. They argue that the government knew that Heritage was not responsible for due diligence because Barringer told the FBI agents before

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[27] At trial O'Brien explained that due diligence consisted of a financial audit to determine "if the financial statements of the company are accurate and that all of the representations that they made to us were true." Tr. Vol. 11, 15.

trial that he did not perform the required due diligence, and the government did not communicate this information to the defendants. The defendants argue that Barringer's 302 is important because it proves that Moore lied in testifying that the due diligence was assigned to Heritage.

The defendants have not shown that evidence in Barringer's 302 that Heritage was not responsible for conducting due diligence is favorable to the defense or material to either guilt or punishment. Defendants have not demonstrated how Moore's alleged lie about the responsibility to conduct due diligence is material to the scheme to defraud, nor have they demonstrated that there is a reasonable probability that the outcome of the trial would have been different if the evidence had been disclosed.

(3) Profits

The defendants contend that there is new evidence to support the defendants' position that they intended to make a profit as a result of the agreement between Builders and Contractors and AIC and that the Department of Insurance knew that they would make a profit. The defendants argue that the source, amount, and nature of the profit are not at issue, but the issue is the government's argument to the jury that defendants said no profit would be earned. The defendants contend that the government violated *Brady* because the government interviewed Barringer and knew or should have known that defendants disclosed their intent to profit and the existence of the management contract between Builders and Contractors and AIC and did not disclose the evidence.

The question whether the defendants expected to receive profits under the management contract has been fully explored at trial, in post trial motions, and on direct appeal. In denying the Rule 29 motion for judgment of acquittal, Judge Sear stated;

> The evidence showed that of the $10,741,728 in cash that was transferred to the O'Keefe trust as the sum necessary to fund the reinsurance plan, ultimately the defendants received "as profits" $5,644,879 in addition to the $1,940,487 in fees paid to AID. This came through the AIC/BCI management agreement that was signed the same day as the reinsurance agreement and two subsequent addendum, the last dated March 17, 1992.... Defendants Schmidt, Bennett and O'Brien paid income taxes on the $5,644,879 and treated the funds as their personal property, in spite of the fact that at no time was a resolution presented to the PNNRG [sic] Board regarding the payment of profits to the defendants or was any disclosure made to the Board or other interested parties of the potential for such profits. Indeed, the defendants at one point denied that they would benefit financially from their efforts for the physicians.[28] Finally, the profits came into the defendants' possession only after passing through the Bahamas.

Judge Sear concluded that "the jury could consider the terms of the agreement between AIC and BCI as to who would receive profits as evidence that such profits were in fact anticipated." *United States v. O'Keefe*, No. 95-0106,

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[28] The denial of a financial benefit was a reference to a new risk retention group that would be formed in the future.

Doc. #318 at 33 (E.D.La. Aug. 15, 1996). Further, the Court of Appeals concluded that the evidence was sufficient to support the conspiracy convictions in that O'Keefe, Schmidt, O'Brien, and Bennett "engaged in a fraudulent scheme to surreptitiously siphon off millions of dollars in PNRRG assets," stating

> Defendants failed to disclose to the DOI and the PNRRG board that they would realize millions of dollars through their management of the reinsurance plan, and at one point denied that they would benefit financially from their efforts for the physicians.
>
> Of the $10.7 million transferred to the O'Keefe trust account as the sum necessary to fund the reinsurance plan, defendants received over $5 million in "profits" in addition to almost $2 million paid in management fees to AIC. The PNRRG board never authorized defendants to personally receive such profits. The "profits" were funds available because defendants had canceled the Sphere Drake contract, canceled coverage for physicians, and refused to pay claims. BCI, the company that was supposedly behind the reinsurance program, received no funds. These "profits" vastly exceeded the amount paid in claims.

United States of America v. O'Keefe, No. 99-3082 (5th Cir. Sept. 25, 2000).

In view of the evidence at trial, the defendants have not demonstrated that there is a reasonable probability of a different outcome if the defendants had presented evidence that Barringer knew that defendants expected to make a profit. The jury could draw its own conclusions about the profits because the management agreement was

presented to the jury at trial. The issue at trial and on appeal was the amount of the personal profit and how it was derived, not whether there was some profit expected by the defendants. There is no *Brady* violation.

b. Barringer's civil deposition testimony

The defendants contend that there is newly discovered evidence from Barringer's civil deposition that there was no requirement to report the Sphere Drake commutation to the Department of Insurance, there was nothing illegal in the cancellations of the doctors' policies, Moore committed perjury because Heritage Management was not responsible for performing the due diligence, and the government falsely alleged that the defendants said that they would receive no profits.

The deposition-testimony evidence does not warrant a new trial based on newly discovered evidence. Barringer was available to the defendants at trial, and it is not probable that the introduction of the testimony from Barringer's civil deposition at a new trial would produce an acquittal.

4. *Napue* violation

The defendants argue that the court should revisit the government's violation of *Napue*. The defendants point out several instances in which the government knew of Moore's perjury and did nothing to correct it: Moore's testimony that he was bribed by O'Keefe, Moore's testimony that O'Keefe had authority over the escrowed funds because the money belonged to Builders and Contractors, and Moore's statement that there was no "deal."

There is no "newly discovered evidence" to support the defendants' contention that Moore's statements were actually false, the government knew that they were false, or that they were material. Moore testified that he believed that the money belonged to Builders and Contractors, and O'Brien shared that belief. As long as Moore maintained the funds in the escrow account, O'Keefe had control over the funds, whether or not he had the authority to disburse the funds.

Further, there is no "newly discovered evidence" that the evolution of Moore's bribery charges against O'Keefe were induced by a "deal." As of October 25, 1993, the government was aware of O'Keefe's possible involvement in the diversion of PNRRG's funds, and Phillips' October 27, 1993 request to open Moore's cooperating witness file indicates that Moore was "in a position to furnish valuable information regarding . . . corruption of state and local public officials." Moreover, Gonzales testified at the hearing on this motion that Moore informed him at an initial interview of O'Keefe's involvement and related his discussions with O'Keefe about Moore's concern for his position with the Department of Insurance and O'Keefe's ability to assist Moore. Accordingly, a new trial is not warranted based on a *Napue* violation.

5. Prosecutorial misconduct

The defendants argue that the government's conduct violated due process in several respects: the government was involved in the evolution of the testimony of Donaldson and Moore to fit its theory of the case, the government failed to produce the initial 302 report of Moore in violation of a court-ordered disclosure, and the

government failed to produce the administrative memoranda of Agent Phillips when Judge Sear ordered an *in camera* review. In addition, the defendants point to the government's systematic violation of the tenets of *Brady* through non-disclosure or late disclosure during the trial, the government's failure to review its files timely, and its failure to respond timely to a subpoena in connection with the instant motion.

"[A] new trial is warranted only when prosecutorial misconduct is so pronounced and persistent that it permeates a trial's atmosphere and casts serious doubt on the correctness of the jury's verdict." *United States v. Mulderig*, 120 F.3d 534, 542 (5th Cir. 1997). After a thorough review of the record and examination of the issues presented in the motion for a new trial, the court concludes that the defendants have not presented new evidence to make the requisite showing for a new trial based on prosecutorial misconduct. Applying the standards of *Napue* and *Brady*, the Court of Appeals has already foreclosed reversal or the granting of a new trial based on the prosecutorial misconduct which was previously revealed. Defendants have failed to produce additional evidence of prosecutorial misconduct in the hearing on this motion which would warrant a different result. Moreover, the defendants contentions in this motion for a new trial concerning the government's postconviction misconduct do not address the jury's verdict and cannot form the basis for a new trial based on prosecutorial misconduct.

6. Attorney general reports of interviews

The defendants contend that the government violated *Brady* by failing to make available a Louisiana Department

of Justice Interview Report of Gene Broussard, the senior estate manager for the Receivership Section of the Louisiana Department of information [sic]. *See* exhibit T-54(c). The contention is not supported by the record.

At the hearing, the government presented testimony that Broussard's interview report was part of the Attorney General's file, which was available to the defendants. Loret Fremin, an intelligence analyst for the Louisiana Department of Justice at the time of the investigation of Johnny Moore, maintained all records of memoranda and interviews and disseminated case information to all attorneys who requested it. Fremin testified that she has never been asked to remove documents from a file nor did she have knowledge that anyone else removed documents from a file. It was her practice to provide the whole file to anyone who requested it. Fremin would prepare a dissemination letter indicating that a file had been reviewed and would obtain the signatures of the person reviewing the file and her supervisor. If the person reviewing the file requested a copy of a document, Fremin would have prepared a second dissemination letter indicating that a copy had been disbursed. Accordingly, the Broussard interview report was available to the defendants upon request, and there is no evidence that any portion of it was suppressed. *See United States v. Aubin*, 87 F.3d 141, 148 (5th Cir. 1996) (*Brady* does not require the government "to conduct a defendant's investigation or to assist in the presentation of the defense's case.").

Further, the Broussard interview report does not contain exculpatory evidence or inconsistent statements. In the January 10, 1994 interview with Ben Gibbens and Danny Mixon, Broussard stated that Moore told Broussard that he had taken the money that was in his trust account.

Moore said that O'Keefe lent Moore the money on the basis of a letter from Charles Donaldson authorizing O'Keefe to invest the money any way he wanted. Moore told Broussard that he had retained counsel and that if he went down, he was going to take other people with him.[29]

Broussard testified at the evidentiary hearing that he asked Moore on several occasions to give him an accounting of the funds in his trust account. After Broussard learned that Moore had used these funds, Broussard asked O'Keefe three times if he had given Moore permission to take the money, but O'Keefe did not respond. The lack of response caused Broussard to believe that there may have been something to Moore's claim.

Accordingly, the defendants have not demonstrated a violation of *Brady*. The evidence was available to the defendants prior to trial at the Attorney General's office, and the evidence of Broussard's statement is not favorable to the defense.

7. Cumulative error

The defendants contend that the court must consider the new evidence cumulatively with all of the errors previously addressed by the courts in this case. Specifically, the defendants argue that the government was involved in the evolution of Moore's testimony to assure that it was consistent with the government's theory of

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[29] The defendants interpret this statement as an indication that Moore was willing to perjure himself. At the evidentiary hearing, the defendants argued that they could have effectively used this statement by Moore on cross examination. However, the statement was available to the defendants prior to trial. See T-54(c).

bribery, and the government abandoned the theory that Moore altered documents in 1991 in order to preserve the credibility of its witness.

Errors that do not amount to a deprivation of due process when taken alone may produce a fundamentally unfair trial when considered cumulatively. *See United States v. Villarreal*, 324 F.3d 319, 328 (5th Cir. 2003); *United States v. Ashworth*, 836 F.2e 260 (6th Cir. 1988). However, relief "based on the cumulative effect of several alleged errors is a rarity." *Villarreal*, 324 F.3d at 328. "[T]he Constitution entitles a criminal defendant to a fair trial, not a perfect one." *United States v. Sepulveda*, 15 F.3d 1161, 1196 (1st Cir. 1993).

The court has determined that the defendants have not produced "newly discovered evidence" that warrants the grant of a new trial. As previously discussed, the defendants did not call Barringer as a witness, even though he was available; the documents produced at the evidentiary hearing on this motion do not support a *Brady* claim; there is no new evidence of a *Napue* violation; and the defendants have not demonstrated new evidence of prosecutorial misconduct that has not been reviewed by the Court of Appeals. In view of this finding, the defendants' theories concerning the cumulative effect of how they would have presented their case before the jury are speculative, and the cumulative-error doctrine has no application in this case.

IV. CONCLUSION

The defendants have not demonstrated that they are entitled to a new trial based on evidence that is newly discovered of a *Brady* or *Napue* violation. Accordingly, a

new trial is not warranted, and the defendants' motions for a new trial based on newly discovered evidence are denied.

New Orleans, Louisiana, this 23 day of October, 2003.

/s/ Mary Ann Vial Lemmon
MARY ANN VIAL LEMMON
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-31061

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MICHAEL O'KEEFE, SR., GARY BENNETT;
JOHN O'BRIEN,

Defendants-Appellants.

Appeals from the United States District Court for
the Eastern District of Louisiana
(95-CR-106)

ON PETITION FOR REHEARING

(Filed January 13, 2005)

Before REAVLEY, BENAVIDES and WIENER, Circuit Judges.

PER CURIAM:*

Counsel for O'Keefe contends that our description of one of his arguments was unduly harsh. We grant the

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* Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

motion for limited panel rehearing as follows. We delete the following sentence from our opinion:

> O'Keefe's argument to this court that Moore gave "false testimony to the jury that he had 'no deal' with the Government," O'Keefe's opening brief at 9, and that in a post-trial civil deposition Moore "for the first time admitted that, through his attorney, he did obtain a 'deal with a government,'" *id.* at 28, is highly misleading and a mischaracterization of the record.

We substitute the following sentence in place of the deleted sentence:

> O'Keefe's argues that Moore gave "false testimony to the jury that he had 'no deal' with the Government," O'Keefe's opening brief at 9, and that in a post-trial civil deposition Moore "for the first time admitted that, through his attorney, he did obtain a 'deal with the government,'" *id.* at 28.

There being no other petition for rehearing, the mandate shall issue.

Memorandum [LOGO]

Date 10/25/93

To: SAC, NEW ORLEANS (196B-NO-52293)

From: SA SUSAN V. PHILLIPS

Subject: DOUGLAS CRUCET, DBA,
PHYSICIANS NATIONAL RISK RETENTION GROUP, INC., ET AL;
FBW; MF
OO: NEW ORLEANS

The purpose of this memo is to recommend that the above captioned case be reopened.

The above captioned case was closed on July 29, 1993, when it was determined that the subjects of PHYSICIANS NATIONAL RISK RETENTION GROUP, INC. (PHYSICIANS NATIONAL) did not falsify the discounting of loss reserves on financial statements they submitted to the LOUISIANA DEPARTMENT OF INSURANCE (LDI) without the knowledge of the LDI. A review of company records revealed that commissioner of Insurance SHERMAN BERNARD wrote a letter in July 1987, authorizing PHYSICIANS NATIONAL to discount loss reserves.

On October 21, 1993, a cooperating witness provided information that $18,632,105 was diverted from PHYSICIANS NATIONAL after the company was placed into liquidation on November 12, 1991.

On October 18, 1991, BUILDERS AND CONTRACTORS INSURANCE COMPANY, LIMITED of the Bahamas, (BCI), purportedly entered into a reinsurance contract with PHYSICIANS NATIONAL. Under the reinsurance contract PHYSICIANS NATIONAL negotiated an amount of $18,105,000 or $18,632,105 in cash and

assets to be transferred to BCI and BCI agreed to reinsure all of PHYSICIANS NATIONAL'S insurance policies with inception dates of 9/1/90 and thereafter. BCI and PHYSICIANS NATIONAL disputed the difference between the $18,105,000 and $18,632,105 which amounted to $527,105 that PHYSICIANS NATIONAL was to transfer to BCI. JOHNNY MOORE, who was a contract attorney hired by the LDI to liquidate PHYSICIANS NATIONAL, deposited the $527,105 into his trust account and was to hold the funds until the dispute was settled. However, MOORE spent the $527,105 for his personal benefit. MICHAEL O'KEEFE, who is an attorney for ASSOCIATED AUDITORS, placed $441,810 of the funds that were supposed to be sent to BCI into his bank account. The cooperating witness believes that the $18,632,105 was diverted from PHYSICIANS NATIONAL because he does not believe BCI is a legitimate company.

Attorney CAREY LEONARD of UNWALA LEONARD & COMPANY, Counsel and Attorneys at law, Bahamas, reviewed the Register under the name BCI and determined that BCI has not filed any documentation since November 1990 and has not paid its' [sic] fees. LEONARD believes that BCI is therefore not in good standing.

Dr. PETER KISLER who is the deputy chairman of BCI, said that BCI never authorized anyone to enter into an reinsurance agreement with PHYSICIANS NATIONAL. KISLER also said that BCI never received any funds or other assets out of this agreement. KISLER also advised that this transaction never appeared on the books and records of BCI in 1991 or 1992.

It is recommended that the above captioned case be reopened and assigned to SA SUSAN V. PHILLIPS to determine if funds were diverted from PHYSICIANS NATIONAL after the company was placed into liquidation.

Memorandum [LOGO]

Date 10/25/93

To: SAC, NEW ORLEANS (196B-NO-52293)

From: SA SUSAN V. PHILLIPS

Subject: DOUGLAS CRUCET, DBA,
PHYSICIANS NATIONAL RISK RETENTION GROUP, INC., ET AL;
FBW; MF
OO: NEW ORLEANS

The purpose of this memo is to request SAC emergency authority to utilize an electronic body recorder and to telephonically record conversations between JOHNNY MOORE (consenting party), MICHAEL O'KEEFE, and others yet unknown, which are expected to occur on 10/26/93.

On October 21, 1993, a cooperating witness provided information that $18,632,105 was diverted from PHYSICIANS NATIONAL after the company was placed into liquidation on November 12, 1991.

On October 18, 1991, BUILDERS AND CONTRACTORS INSURANCE COMPANY, LIMITED of the Bahamas, (BCI), purportedly entered into a reinsurance contract with PHYSICIANS NATIONAL. Under the reinsurance contract PHYSICIANS NATIONAL negotiated an amount of $18,105,000 or $18,632,105 in cash and assets to be transferred to BCI and BCI agreed to reinsure all of PHYSICIANS NATIONAL'S insurance policies with inception dates of 9/1/90 and thereafter. BCI and PHYSICIANS NATIONAL disputed the difference between the $18,105,000 and $18,632,105 which amounted to $527,105

that PHYSICIANS NATIONAL was to transfer to BCI. JOHNNY MOORE, who was a contract attorney hired by the LDI to liquidate PHYSICIANS NATIONAL, deposited the $527,105 into his trust account and was to hold the funds until the dispute was settled. MICHAEL O'KEEFE, who is an attorney for ASSOCIATED AUDITORS, told MOORE that he could keep the funds and use them. MOORE spent the $527,105 for his personal benefit even though he knew that the funds should be held in escrow. MICHAEL O'KEEFE placed $441,810 of the funds that were supposed to be sent to BCI into his bank account. The cooperating witness believes that the $18,632,105 was diverted from PHYSICIANS NATIONAL because he does not believe BCI is a legitimate company.

Attorney CAREY LEONARD of UNWALA LEONARD & COMPANY, Counsel and Attorneys at law, Bahamas, reviewed the Register under the name BCI and determined that BCI has not filed any documentation since November 1990 and has not paid its' [sic] fees. LEONARD believes that BCI is therefore not in good standing.

Dr. PETER KISLER who is the deputy chairman of BCI, said that BCI never authorized anyone to enter into an reinsurance agreement with PHYSICIANS NATIONAL. KISLER also said that BCI never received any funds or other assets out of this agreement. KISLER also advised that this transaction never appeared on the books and records of BCI in 1991 or 1992.

In October 1993, PRICE WATERHOUSE auditors and civil attorneys began asking questions about the missing $527,105 that was deposited into MOORE'S bank account. On October 18, 1993, O'KEEFE told MOORE that he had things worked out and MOORE should not have any

problems with the $527,105. O'KEEFE devised a plan in writing in which to deceive the auditors and the civil attorneys by representing that the $527,105 had been sent to BCI. O'KEEFE suggested that MOORE write a $1,000 check payable to BCI for interest payments on a loan. O'KEEFE asked MOORE to give him the $1,000 check so that he could quickly run the check through BCI's bank account. O'KEEFE then suggested that MOORE write another check in the amount of $527,105 which would not be negotiated. O'KEEFE said he would copy the back of the $1,000 check and the front of the $527,105 check and present them to the auditors and the civil attorneys. O'KEEFE presented this plan to MOORE in writing and then put the piece of paper in his notepad.

On October 23, 1993, O'KEEFE requested another meeting with MOORE to help him work out his problems.

MOORE has agreed to consensually monitor conversations with O'KEEFE in an attempt to obtain admissions from O'KEEFE regarding the above matter. MOORE is willing to testify in court and will execute and FD-472 and FD-473.

Assistant United States Attorney (AUSA) EDWARD J. GONZALES, Middle District of Louisiana, has been informed of the above matter and concurred with the consensual recording of conversations between JOHNNY MOORE, MICHAEL O'KEEFE and others yet unknown. AUSA GONZALES did not consider entrapment to be a matter of concern.

Memorandum [LOGO]

Date 12/9/93

To: SAC, NEW ORLEANS (196B-NEW)

From: SA SUSAN V. PHILLIPS

Subject: MICHAEL O'KEEFE,
ERIC SCHMIDT, DBA,
ASSOCIATED AUDITORS, INC.;
CHARLES DONALDSON; DBA,
BUILDERS AND CONTRACTORS INSURANCE
COMPANY, LIMITED of the Bahamas;
JOHNNY C. MOORE, Contract Attorney,
LOUISIANA DEPARTMENT OF INSURANCE;
FBW; MF
OO: NEW ORLEANS

The purpose of this memo is to recommend that the above captioned case be opened.

On May 25, 1987, PHYSICIANS NATIONAL RISK RETENTION GROUP (PHYSICIANS NATIONAL) was incorporated in the state of Louisiana. PHYSICIANS NATIONAL operated under the federal risk retention law and wrote substandard medical malpractice insurance to health care professionals throughout the country. On November 12, 1991, after several months of solvency hearings at the LOUISIANA DEPARTMENT OF INSURANCE (LDI), PHYSICIANS NATIONAL was placed into liquidation. HERITAGE MANAGEMENT SERVICES, INC., 910 North Bon Marche Drive, Baton Rouge, Louisiana, was designated by the LDI to liquidate PHYSICIANS NATIONAL.

On October 21, 1993, NO 5946-CW-WC provided information that $18,632,105 was diverted from PHYSICIANS NATIONAL after the company was placed into liquidation.

NO 5946-CW-WC advised that on October 18, 1991, BUILDERS AND CONTRACTORS INSURANCE COMPANY, LIMITED of the Bahamas, (BCI), purportedly entered into a reinsurance contract with PHYSICIANS NATIONAL. Under the reinsurance contract PHYSICIANS NATIONAL negotiated an amount of $18,105,000 or $18,632,105 in cash and assets to be transferred to BCI and BCI agreed to reinsure all of PHYSICIANS NATIONAL'S insurance policies with inception dates of 9/1/90 and thereafter. BCI and PHYSICIANS NATIONAL disputed the difference between the $18,105,000 and $18,632,105 which amounted to $527,105 that PHYSICIANS NATIONAL was to transfer to BCI. JOHNNY MOORE, who was a contract attorney hired by the LDI to liquidate PHYSICIANS NATIONAL, deposited the $527,105 into his trust account and was to hold the funds until the dispute was settled. However, MOORE. spent the $527,105 for his personal benefit. MICHAEL O'KEEFE, who is an attorney for ASSOCIATED AUDITORS, placed $441,810 of the funds that were supposed to be sent to BCI into his bank account. NO 5946-CW-WC believes that the $18,632,105 was diverted from PHYSICIANS NATIONAL because he does not believe BCI is a legitimate company.

Attorney CAREY LEONARD of UNWALA LEONARD & COMPANY, Counsel and Attorneys at law, Bahamas, reviewed the Register under the name BCI and determined that BCI has not filed any documentation since November 1990 and has not paid its' [sic] fees. LEONARD believes that BCI is therefore not in good standing.

Dr. PETER KISLER who is the deputy chairman of BCI, said that BCI never authorized CHARLES DONALDSON or anyone else to enter into an reinsurance agreement with PHYSICIANS NATIONAL. KISLER also said that BCI never received any funds or other assets out of this agreement. KISLER also advised that this transaction never appeared on the books and records of BCI in 1991 or 1992.

On November 17, 1993, Assistant United States Attorney EDWARD J. GONZALES requested that the FBI open a case regarding the above matter.

It is recommended that the above captioned case be opened and assigned to SA SUSAN V. PHILLIPS to determine if funds were diverted from PHYSICIANS NATIONAL after the company was placed into liquidation.